IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

*Appellants,*

v.

No. [redacted]

B. HAYWOOD HAGERMAN,

*Appellee.*

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# Appellants' Brief on Motion to Dismiss

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## STATEMENT.

This case, originally appealed from the District Court of the United States for the Western Division of the Western District of Missouri to the Circuit Court of Appeals for the 8th Circuit, has, by the latter court, been transferred here, pursuant to the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto

Section 238-a. *McMillan Contracting Co. et al.* v. *Abernathy et al.*, 284 Fed., 354.

This act, providing for the transfer between the Supreme Court and the respective Circuit Courts of Appeals, of appeals taken to the wrong court, was passed by Congress to remedy the situation referred to by Chief Justice Taft in an address before the American Bar Association at San Francisco. This address is published in the Association Journal for October, 1922, the following excerpt being found at pages 603 and 604:

> "The statutes defining the jurisdiction of the Supreme Court and Circuit Courts of Appeals are not as clear as they should be. It is necessary to consult a number of them in order to find exactly what the law is, and I regret to say that without clarification by a revision, the law as to the jurisdiction of the Supreme Court and the Circuit Courts of Appeals is more or less a trap in which counsel are sometimes caught."

This case presents an illustration of this "trap" and falls within the express terms of the Act, if, as held by the Circuit Court of Appeals, the appeal to it was erroneous.

Appellants contend that the appeal was properly taken to the Circuit Court of Appeals, and that that court erred in refusing to assume jurisdiction and in transferring the case to this court. Accordingly appellants have filed herein a motion to remand the cause to the Court of Appeals, or to hear and determine the same as upon certificate from said Court of Appeals under Sections 239, 240 and 264 of the Judicial Code. Appellants' contentions respecting

the propriety of the appeal to the latter court are embraced in a memorandum filed with the motion to remand. For the reasons set forth in that memorandum appellants insist that the Act of September 14, 1922, was improperly invoked.

However, if the position taken by the Court of Appeals respecting its jurisdiction of the case be sustained by this court, the Act of Congress of September 14, 1922, applies, and appellees' motion to dismiss should be denied.

Appellees contend that the Act in question, so far as it refers to appeals taken before its passage, is unconstitutional; that the judgment in the lower court became final upon the expiration of three months' period allowed for an appeal to this court; and that rights in, to and under said judgment thereupon became vested and absolute and free from the effects of subsequent legislation. The facts are not controverted: that the judgment in the District Court was rendered July 7, 1921; that the appeal to the Court of Appeals was allowed January 4, 1922, more than three months, but less than six months, thereafter; and that the Act of September 14, 1922, was passed and approved while the case was pending on a motion to dismiss in the Court of Appeals.

Beyond question the Act, as applied to the appeal in this case, is constitutional. If the position taken by the Court of Appeals as to its jurisdiction is correct, the remedy provided by the Act was properly invoked by that court, and under its terms and pursuant to the order of the Court of Appeals this court should hear and determine the cause in the same manner as if directly and duly appealed to this court.

## ARGUMENT.

**Section 238-a of the Judicial Code, approved September 14, 1922, applies to the appeal in this case, and confers jurisdiction upon the Supreme Court to proceed to the determination thereof.**

The only provision in the Constitution of the United States which might prevent the application of the Act to this appeal is that part of the Fifth Amendment prohibiting the deprivation of life, liberty or property without due process of law. The restriction in Article I, Section 9 of the Constitution, as to the passage of *ex post facto* laws, has no application, since that prohibition relates to criminal and penal laws only.

> *Calder* v. *Bull,* 3 Dall. 386;
> *Duncan* v. *Missouri,* 152 U. S. 377, 14 S. Ct. 570;
> *Mallett* v. *North Carolina,* 181 U. S. 589, 21 S. Ct. 730.

And except to the extent that the impairment of contracts is a violation of the due process clause, there is nothing in the Constitution making an Act of Congress invalid as an impairment of the obligation of contracts. Article 1, Section 10, with respect to such laws, is, by its terms, a restriction on the power of the state, and not of the national government.

Hence the Act is constitutional in its application to this case *unless appellees had a property right in the judg-*

*ment below, of which they were deprived, without due process to law,* by the order of the Circuit Court of Appeals transferring the case to this court.

The motion to dismiss is based on the contention that the Act divests *vested rights* under the judgment. It is to be noted that the words "vested rights" appear nowhere in the Constitution. Rights, vested or otherwise, are protected under the Fifth Amendment only as embraced within the term "property". What *property* had appellee in the judgment below? Of what property in said judgment has appellee been deprived by Section 238-a of the Judicial Code? If any, is that deprivation pursuant to due process of law?

## I.

1. Appellee's whole argument is that the Act of September 14, 1922 cannot constitutionally be made to apply to judgments **then final. This argument ignores the circumstance that an appeal was pending in this case at the time of the passage of the Act.** Appellants insist that the pendency of the appeal eliminates all question of the propriety of a retroactive application of the statute. The Act has not been applied retroactively. No final judgment has been affected.

**Even if the Circuit Court of Appeals was without jurisdiction, the case was nevertheless pending in that court on appeal.** The order of the District Court, entered January 4, 1922, granting an appeal to the Court of Appeals, was not void, but on the contrary suspended the operation of

the judgment below, and transferred the case to the appellate court.

This proposition of law, as to the effect of such an appeal, has been declared by the courts on many occasions. The case of *Smith* v. *Chytraus,* 152 Ill. 664, 38 N. E. 911, is a leading decision on the point. In that case the order of the lower court gave plaintiff certain relief on condition that he pay to defendant, within sixty days from the date of the order, a certain sum of money. An appeal was taken from said order and decree to the State Court of Appeals. Thereafter a motion to dismiss was sustained in said court, on the ground that the appeal should have gone to the State Supreme Court, rather than to the Court of Appeals, and that the latter court was without jurisdiction. The case was then redocketed in the lower court. In the meantime a period of more than sixty days from the date of the decree had expired, and accordingly defendant prayed the lower court for an order of dismissal, in as much as plaintiff had failed, within the sixty day period, to make the payment upon which the relief was conditioned. The court thereupon entered a final order of dismissal. On error to the Supreme Court this order is reversed. The Supreme Court holds that the appeal to the Court of Appeals, although that court was without appellate jurisdiction of the case, nevertheless operated as an appeal, and was valid as such until dismissed, and stayed and suspended the operation of the judgment below, and that the time during which the appeal was pending should be deducted from the sixty days allowed by the original order. The following portion of the opinion deals with that question (p. 669):

. . . . . .

"It is urged by defendants in error that the appeal that was allowed and that was taken was an appeal to the appellate court, that the appellate court had no jurisdiction to entertain the appeal, and that, therefore, the appeal was void and of no effect, and that it follows that the restraining of further proceedings implied from an appeal to a court which has no jurisdiction to entertain such appeal must be without any effect also. The premises may be conceded, but we think the conclusions do not follow. In *Reynolds* v. *Perry*, 11 Ill. 534, Perry brought suit against Reynolds, and recovered judgment for costs only. Reynolds prayed an appeal to this court, and it was granted to him, and he perfected his appeal by filing an appeal bond. At that time the statute only allowed appeals where the judgment, exclusive of costs, amounted to the sum of $20, or related to a franchise or freehold. It was held that the appeal was improvidently granted, but also held that it restrained Perry from collecting his judgment. It was the right of the defendants to pray for an appeal. It was the province of the court to determine to what court of review or appellate jurisdiction the case was appealable, and to fix the terms on which the appeal might be taken. We said in *Hake* v. *Strubel*, 121 Ill. 321, 12 N. E. 676: 'The making of the order allowing appeal and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. The making of the order is an exercise of the judicial power vested in the presiding judge, but the order when made is the order of the court.' The court, then, when it granted an appeal to the appellate court, was acting judicially, and in respect to a matter that was specially committed to its charge by the statute. It had jurisdiction of the parties and of the subject-matter, and what it did, although it may have been erroneous was not absolutely void and of no effect.

The parties had a right to rely upon it, and were bound by it, until it was set aside by some court lawfully authorized so to do. Sometimes it may be a matter of great doubt to what court a particular suit or proceeding is properly appealable. The trial court, in the first instance, must determine that question, and it determines it judicially, by an exercise of the judicial power that is vested in it. * * *

Our conclusion, then is that the appeal herein to the appellate court, even though granted to a tribunal that had no jurisdiction to entertain it, operated for the time being as an appeal, and became a supersedeas, and temporarily stayed all proceedings whatever to enforce the execution of the decree."

The case of *Daly* v. *Kohn,* 230 Ill., 436, 82 N. E., 828 is to the same effect. The court reiterates that an order allowing an appeal to the Court of Appeals transfers the case to that court, even though that court has no jurisdiction of the appeal, and that proceedings below are stayed until the appeal is dismissed.

A similar question arose in *Merrifield* v. *Western Cottage Piano Co.,* 238 Ill. 526, 87 N. E. 379. Appellee there contended that the proceedings below should not be stayed by the appeal which had been taken, because the appeal was from an interlocutory order, from which no appeal was allowable. The court disposes of this contention thus:

"Appellant contends that said order of February 18th was a final and appealable one, while appellee contends that it was interlocutory and not appealable. However that may be, the appeal was allowed as prayed, and after the filing and approval of the appeal bond that question was transferred to the Appellate Court for its decision.

When an appeal is perfected, the jurisdiction and control of the court below ceases, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree. *Smith* v. *Chytraus*, 152 Ill. 664, 38 N. E. 911; *Cowan* v. *Curran*, 216 Ill. 598, 75 N. E. 322; *Bower* v. *Chicago West Division Railway Co.*, 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81; *A. R. Barnes & Co.*, v. *Typographical Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (N. S.) 1150."

The case of *American Button-Hole, Overseaming & Sewing Machine Co.* v. *Gurnee*, 38 Wis. 533, also establishes that an appeal from an interlocutory order, although such an order is not appealable, is not a nullity, but is operative until dismissed.

It has also been held that the allowance by the court of an appeal to a party who had no right to appeal, transfers the case to the appellate court, and that any action taken by the lower court thereafter, while such appeal is pending, is void and will be set aside.

*Baasen* v. *Eilers*, 11 Wis. 277.

When the lower court grants an appeal from the judgment or decree, the jurisdiction of that court ceases, and it cannot disregard the appeal and proceed to carry the judgment into effect, nor can it pass upon the legality of the appeal.

*Dunbar* v. *Dunbar*, 5 W. Va. 567.

In *Pemberton* v. *Zacharie*, 5 La. Ann. 310, the court treats of the matter thus:

> "We consider it clear, that after the inferior court granted the appeal, its cognizance of the case in the issue joined on these exceptions terminated, until that appeal was disposed of. The case could not be pending on this point in the supreme court and the district court at the same time. (page 314).
>
> It has been contended that as this court has decided that the appeal was improperly granted, it could not have had the effect of suspending proceedings in the inferior court. But it is obvious that the effect of an appeal does not depend on the ultimate disposition which may be made of it, but on the fact that it is pending and undecided." (page 315).

There are many decisions to the effect that a judgment from which an appeal is pending cannot be pleaded as an adjudication in bar of a subsequent suit between the same parties involving the same subject matter.

*Edwards* v. *Bodkin*, 267 Fed. 1004;
*Eastern Bldg. & Loan Assn.* v. *Welling*, 103 Fed. 352;
*Delk* v. *Yelton*, 103 Tenn. 476, 53 S. W. 729;
*Day* v. *De Younge*, 66 Mich. 550, 33 N. W. 527;
*Fassler* v. *Streit*, 92 Neb. 786, 139 N. W. 628;
*Purser* v. *Cady*, 120 Cal. 214, 52 Pac. 489.

There can manifestly be no vested property right in a judgment, which is so far suspended that its existence cannot be pleaded or proven in a suit involving the very rights involved in the judgment.

The proposition that an appeal was pending in this case at the time of the passage of the Act of September 14, 1922, is supported by decisions to the effect that the filing of a suit in a court without jurisdiction of the same suspends the running of the statute of limitations. The filing of such a suit is held to be the commencement of an action. There are many such decisions:

*Smith* v. *McNeal*, 109 U. S. 426;
*McCormick* v. *Eliot*, 43 Fed. 469;
*Woods* v. *Houghton*, 1 Gray (Mass.) 580;
*Little Rock, M. R. & T. Ry. Co.* v. *Manees*, 49 Ark. 248, 4 S. W. 778;
*Pittsburg, C. C. & St. L. Ry. Co.* v. *Bemis*, 64 Oh. St. 26, 59 N. E. 745;
*Lamb* v. *Howard*, 102 S. E. 436 (Ga.);
*Wilbourne* v. *Mann*, 81 So. 816 (Ala.);
*Blume* v. *New Orleans*, 29 So. 106 (La.);
*Atlanta, K. & N. Ry. Co.* v. *Wilson*, 47 S. E. 366 (Ga.);

2. It must be clear from the above authorities that the case was pending on appeal in the Circuit Court of Appeals at the time of the passage of Section 238a of the Judicial Code. Such being the fact, there is no constitutional objection to the application of the Act. The statute as applied to this case simply validates an appeal improperly taken, pending at the time of its passage. Such an act does not divest any vested rights. Statutes have been sustained which correct or render immaterial defects in pending appeals vital under the

law in existence at the time of their allowance. Similar statutes have been upheld giving the appellate court jurisdiction of an appeal then pending, although no such jurisdiction existed when the appeal was taken.

In *Hepburn* v. *Curts*, 7 Watts (Pa.) 300, a statute was sustained and given application to a pending appeal, to the effect that "no action now pending on writ of error or otherwise, by partners or persons against partners or persons, shall abate or be defeated, by reason of one or more individuals being members of both firms."

In *Warton* v. *Cunningham*, 46 Ala. 590, a statute of 1870, curing a vital defect in the bill of exceptions on file in a case pending on appeal, is held to validate the appeal, although the bill of exceptions was filed and the appeal taken several months before the statute was passed.

The case of *Teel* v. *Chesapeake & Ohio Ry. Co.*, 204 Fed. 914, 123 C. C. A. 210, holds that where a necessary party defendant is omitted from a writ of error, the Circuit Court of Appeals is authorized by Sections 954 and 1005, Revised Statutes, and by the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 829, allowing the unprejudicial amendment of certain defects in writs of error to the district courts, to permit an amendment of a writ of error inserting the name of the omitted party and bringing such party in by a new citation, even though the time for suing out a new writ had expired. The court states the law as follows (page 917):

> "Such defects as this are generally curable by amendment of the writ of error and the issue of a new citation. Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character

wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted. See Act of September 24, 1789, c. 20, Sec. 32, 1 Stat. 91, Rev. Stat. Sections 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714); *Walton* v. *Marietta Chair Co.*, 157 U. S. 344, 346, 15 Sup. Ct. 626, 39 L. Ed. 725; *Knickerbocker Life Ins. Co.* v. *Pendleton, supra; Estes* v. *Trabue, supra; Thomas* v. *Green County*, 146 Fed. 970, 971, 77 C. C. A. 487 (C. C. A. 6th Cir.) affirmed in 211 U. S. 598, 601, 29 Sup. Ct. 168, 53 L. Ed. 343. In *Gilbert* v *Hopkins*, 198 Fed. 849, 117 C. C. A. 491 (C. C. A. 4th Cir.), a writ of error seasonably sued out was permitted to be amended by inserting the name of an omitted party, although the time fixed for suing out such a writ had then expired, and the new party was required to be brought in by a new citation.

The time for allowing a new writ of error has likewise expired in the instant case; but in view of the statutory provisions before alluded to, and of section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 U. S. Comp. St. 1901, pp. 552), we are disposed to enter a rule on the plaintiff in error to show cause, within ten days after the order is entered, why the Chesapeake & Ohio Railway Company of Kentucky should not be made a party defendant to her proceeding in error and for defendant in error so to show cause why the writ of error shoud not be permitted to be amended by inserting the name of that company and a new citation to be issued to it."

*Gilbert* v. *Hopkins*, 198 Fed., 849, 117 C. C. A., 491, referred to in the above excerpt, is to the same effect.

The case of *Freeborn* v. *Smith*, 2 Wall.160, is in effect a controlling authority on the present motion. The plaintiff in that case had obtained a judgment against the defendant in

the Supreme Court of Nevada Territory. A writ of error was issued to this judgment from the Supreme Court of the United States and the record of the case was filed in this court. Thereafter, Nevada was admitted to the Union, the enabling act, however, making no provision for the disposal of cases then pending in this court on error or appeal from the territorial courts. This court had previously held, in a number of cases, that in such a situation, this court had lost all jurisdiction of and power to proceed with such pending cases. About one year after the admission of Nevada into the Union, and more than two years subsequent to the filing of the record of the case in this court, Congress passed the following statute:

> "That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of excution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon."

A motion to dismiss had been filed in the case before the statute was passed, but the court, being advised that a bill was before Congress touching the matter, suspended action on the motion till it was seen what Congress might do. After the passage of the act, the motion to dismiss was renewed and was argued at great length by counsel for the defendant. The

argument in support of the motion is identical with that put forward by appellee in this case. Every contention as to the finality of judgments and vested rights and opening up of settled adjudications, made by counsel for appellee herein, was strongly urged upon the court in that case, as shown by the report. The court, however, was not impressed with the reasoning, and denied the motion to dismiss. In the following language the court strikingly disposes of the objections to the act (pages 173, 174, 175):

> "It is objected to the act of 27th of February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded. * * * What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well setlted that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending, and give a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. * * * If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. 'The truth is,' says Chief

Justice Parker, in *Foster* v. *Essex Bank,* 'there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

It is difficult to see why this case of *Freeborn* v. *Smith,* is not conclusive of the present question. The Supreme Court in that case had no jurisdiction of the appeal at the time of the passage of the Act. The case had, however, previously been taken to the Supreme Court, and, in a sense, was pending in that court when the Act was passed. Congress then says that all cases heretofore prosecuted on writ of error or appeal to and now pending in the Supreme Court, of which that court had no jurisdistion by reason of the omission of a saving clause in the Nevada enabling act, may be heard and determined in said court. In precisely the same manner, the Act of September 14, 1922, provides that cases theretofore appealed to and then pending in the Court of Appeals, as to which that court has no jurisdiction, shall not be dismissed, but shall be transferred to the Supreme Court. If the Act of September 14, 1922 had provided that the Court of Appeals should hear and determine such causes, instead of transferring them to this court, the statutes would be almost identical. As to the power of Congress to enact them, there is no possible distinction.

If Section 238-a might constitutionally have vested the Court of Appeals with jurisdiction of this case (as the

statute in *Freeborn* v. *Smith* conferred jurisdiction upon the Supreme Court), it is no objection to the Section that, instead, it directs a transfer of the case to this court. If the appeal is at all subject to the legislative power of Congress, Congress may vest jurisdiction in either court, at its discretion. Cases pending on appeal in one appellate court, may, without the violation of any constitutional guaranties, be, by statute, transferred to another appellate court for hearing and disposition.

*Duncan* v. *Missouri*, 152 U. S., 377, 14 S. Ct., 570;
*Zellars* v. *Surety Co.*, 210 Mo., 86, 108 S. W., 548;
*Branson* v. *Studebaker*, 138 Ind., 147, 33 N. E., 98.

3. The same principle as to the power of the legislature to legislate concerning pending controversies is applied in another line of similar cases.

It is well settled law that a statute, passed subsequent to the filing of a suit in a court which has no jurisdiction of the action in question, may vest that court with jurisdiction of the case, whether its lack of jurisdiction be as to the parties to the suit or as to the subject matter of the action. For example, a statute increasing the jurisdictional amount involved in suits which may be filed before a justice of the peace, may have the effect of vesting the justice with jurisdiction of cases filed before the act was passed, although no jurisdiction obtained in such cases prior to the act. Similarly, a jurisdictional requirement that the justice of the peace reside in the township in which the subject-matter of the action is located, or in which one of the parties re-

sides, may be abolished by statute, and thereby suits previously filed, which at the time were not cognizable by the justice, may be brought within his jurisdiction.

*Cunningham* v. *Dixon,* 15 Del., 163, 41 Atl., 519;
*Mather* v. *Chapman,* 6 Conn., 54;
*Muncie National Bank* v. *Miller,* 91 Ind., 441;
*Walpole* v. *Elliott,* 18 Ind., 258;
*Wilbourne* v. *Mann,* 81 So., 816 (Ala.)

## II.

It seems clear from the foregoing, that the appeal in this case was pending in the Court of Appeals when Section 238-a was enacted, and that therefore there is no constitutional objection to the application of the Act. Appellee's brief contains no suggestion that the Act cannot apply to pending appeals. Their whole argument is that *final* judgments cannot be affected by subsequent legislation.

1. On the contrary, the authorities are strong to the effect that it is within the power of Congress to make such a statute applicable even to cases wherein no appeal was pending when the statute was approved, and the time for appeal had expired.

It is well settled that litigants have no vested right in any particular remedy allowed by law for the enforcement of rights of action; and a remedy available when suit was filed or judgment obtained may be changed or abolished at the will of the legislature, provided only that a reasonably good remedy still remains or has been substituted for the

old. We believe that the Act of September 14, 1922, is a *remedial act,* that is, a statute affecting remedies merely, and that it could constitutionally be applied even to cases not pending on appeal at the time of its passage.

Appellee has, in the memorandum in support of the motion to dismiss, cited a number of cases to the effect that after a final judgment has been rendered, and the time then allowed by law for the taking of an appeal therefrom has expired, without an appeal having been taken, it is not competent for the legislature retroactively to extend the time for appeal and to allow a reconsideration of the case. With very few exceptions the cases referred to by appellee are decisions of state courts, arising under state statutes. They are entitled to little weight here, for the following reasons: (1) Many of the constitutions of the states in question expressly prohibit retroactive legislation; (2) The states are, by the federal constitution, denied the power to pass laws impairing the obligation of contracts, whereas there is no such prohibition on the power of Congress. Many state courts have held that a judgment is a contract within the meaning of that constitutional limitation.

None of the federal cases cited, with one exception, have any real bearing on the present controversy.

The decisions referred to on page 16 of appellee's brief are admittedly correct. The court cannot extend the statutory time within which an appeal must be taken and perfected. The following decisions, appearing on pages 17 and 18 of appellee's brief, are distinguishable: *Chase* v. *U. S.*, 222 Fed., 593; *Choat* v. *Trapp,* 224 U. S. 665; *Jones* v *Mechan,* 175 U. S., 1; *In re Heff,* 197 U. S., 488; *Cherokee Nation* v. *Hitchcock,* 187 U. S., 294; *Wilson* v. *Wall,* 6 Wall.

89; *Reichert* v. *Felps,* 6 Wall., 160. They all involve the power of Congress to interfere with rights acquired under or vested by previously established treaties,—a question obviously of no application here. The cases of *U. S.* v. *Ry.,* 165 Fed., 742; *San Mateo Co.* v. *Ry.,* 13 Fed., 151, and *Murray* v. *Land Co.,* 18 How., 277, cited on page 18, have no bearing.

*Blair* v. *Miller,* 4 Dallas 21, merely holds that a writ of error, not returned at the proper term, is ineffective. In *State of Pa.* v. *Bridge Co.,* 18 How., 431, plaintiff brought a bill to have a bridge across the Ohio river removed, as an obstruction to navigation. A decree was entered as prayed. Thereafter Congress passed an act declaring the bridge to be a lawful structure. This act was held to supercede the effect of the decree. Such a decision certainly does not seem to support appellee's contention. The court does say that as a general proposition rights which have passed into judgment became absolute, but holds that this general rule does not apply in the case under consideration.

The case of *United States* v. *Aakervik,* 180 Fed., 137, is the only federal case cited by appellees which has any real bearing, and it would seem to be wrong, on principle; and there is a later decision to the contrary, arising under the very same statute involved in the Aakervik case,—the case of *United States* v. *Ellis,* 185 Fed., 546.

This court has, in a number of decisions, expressly sustained acts of Congress providing a new remedy by which judgments previously rendered and not pending on appeal, and as to which the time for appeal had expired, might be reopened.

The case of *The Protector,* 9 Wall., 687, is particularly apposite. There a decree had been rendered in the Federal Court for one of the southern states on April 5, 1861. An appeal therefrom was taken to the Supreme Court on July 28, 1869. The Judiciary Act at the time required appeals to be taken within 5 years. The court held that the same principle applies to the time for taking appeals as to the general statute of limitations and that the period of the war must be deducted from the time which had expired after the rendition of the decree. The appeal was therefore held proper. The appellee contended that the time for taking the appeal was limited to one year by the following Act of Congress, approved March 2, 1867 (14 Statutes at Large 545):

> "Where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, *notwithstanding the time limited by law for bringing the same may have previously expired;* and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within ONE YEAR from the passage of this act."

The statute was not expressly applied, but the court clearly stated that the purpose and effect of the Act was to continue the right of appeal in cases where it had been lost. At page 690 of the opinion, the court speaks of the Act as follows:

> "We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to

take away any right of appeal, *but to continue the right in cases where it had been lost.* 'Where the common law and a statute differ,' says Blackstone, 'the common law gives place to the statute; and an old statute gives place to a new one. * * * But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative.' * * * Such repugnancy does not exist here. *Many cases may be supposed, in which the right of appeal would be saved by the statute of* 1867, which would not be saved by the act of 1789 and the operation of the common law rule followed in *Hanger* v. *Abbott. If four years of the five elapsed before the war, the right of appeal would be saved by the act of* 1867, *but would be gone under the operation of the act of* 1789, *unless the appeal were brought before the passage of the former act.*"

The same statute was referred to in *United States* v. *Wiley*, 11 Wall., 508, which arose under an Act of Congress extending the time within which suits might be brought in states where, during the rebellion, the ordinary course of judicial proceedings had been interrupted. The following language appears in the opinion (page 514):

> "The Act of March 2d, 1867, authorized appeals and writs of error from and to courts in judicial districts when the regular sessions of the courts had been suspended by insurrection or rebellion, if brought or sued out within one year from the passage of the Act. This Act might with more reason be claimed as raising an implication that such appeals or writs of error cannot be allowed after the expiration of a year from its passage. Yet in The Protector it was held that an appeal was in time though not taken until July 28th, 1869, more than eight years after the final decree in the Circuit Court, and more than two years after the enactment of 1867, and this because the four years of the war were to be deducted. In other words, the statute

being affirmative only, raised no implication of an intent to repeal a former statute or alter the common law to which it was not repugnant."

The Act of March 2, 1867, above referred to, goes much further, so far as the present question is concerned, than Section 238-a. It actually restores a right of appeal that had been lost; Section 238-a merely remedies a defect in a pending appeal. Yet the court did not seem even to question the validity of that Act.

An earlier case in this court, *Sampeyreac* v. *U. S.*, 7 Pet., 222, sustains the validity of an Act of Congress of May 8, 1830, which granted to the federal court in the Territory of Arkansas, power to proceed by bills of review, filed or to be filed, for the purpose of revising all or any decrees of said court, in cases wherein it shall appear that the jurisdiction of the same was assumed on any forged warrant, concession, grant, order of survey, or other evidence of title. The bill of review was filed shortly before the passage of the Act, to set aside a decree obtained in 1827. The lower court granted the relief prayed, and this court affirmed the decree. The decree of 1827 had become final before the passage of the Act, the one year period for appeal having expired; yet this court sustained the statute.

In *Calder* v. *Bull*, 3 Dallas, 386, and *Baltimore & Susquehanna R. R.* v. *Nesbit*, 10 How., 395, this court sustained the validity, so far as the federal constitution is concerned, of state statutes granting the right of a new trial in certain cases as to which the time for appeal had expired.

The following state decisions uphold statutes affording remedies by appeal or error or by way of new trial,

passed after the judgments in question had become final by the then existing law:

*Page* v. *Matthews,* 40 Ala., 547;
*Noel's Heirs* v. *Noel's Adm.,* 40 Ala., 576;
*Wheeler's Appeal,* 45 Conn., 306;
*Calvert* v. *Williams,* 10 Md., 478;
*Alvord* v. *Little,* 16 Fla., 158;
*Henderson & Nashville R. R.* v. *Dickenson,* 173 Mon. (Ky), 173;
*Davis* v. *Ballard,* 1 J. J. Marshall (Ky), 563.

2. This court has held, in a number of cases, that a statute passed after the rendition of a judgment may grant a right of appeal therefrom, though no such right existed when the judgment was rendered. These cases are in point here. There is no difference in principle in extending a right of appeal after the same has expired and in granting such a right for the first time subsequent to the entry of a judgment not appealable.

*Mallett* v. *North Carolina,* 181 U. S. 589, 21 S. Ct. 730;
*Stephens* v. *Cherokee Nation,* 174, U. S. 445, 19 S. Ct. 722;
*Essex Public Road* v. *Skinkle,* 140 U. S. 334, 11 S. Ct. 790;
*In re Claasen,* 140 U. S. 200, 11 S. Ct. 735;
*Garrison* v. *New York,* 21 Wall. 196.

In the last case cited, at page 205 of the opinion, the court says:

"The objection to the act of 1871, that it impairs the vested rights of the plaintiff, and is therefore, repugnant

> to the constitution of the State, is already disposed of by what we have said upon the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed."

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 476-478, the appeals there considered were from decrees of the United States Court in the Indian Territory, rendered in cases pending therein, denying the right of various individuals to citizenship in certain Indian tribes. Under the law existing at the time of their rendition, appeals could be taken only to said United States Court, whose judgment was expressly made final by the statute. After the judgments had thus become final, by Act of July 1, 1898, Congress provided that there should be a right of appeal from the United States Court to the Supreme Court. The act by its terms was retroactive and was held to apply to the decrees. It was contended by appellees that it was not competent for Congress to provide for an appeal from the decrees of the United States Court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute. In reply the Court said (p. 477):

> "The contention is that the Act of July 1, 1898, in extending the remedy by appeal to this Court was invalid because retrospective, an invasion of the judicial domain and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void * * * *The grant of a new remedy by way*

*of review has been often sustained under particular circumstances. Calder* v. *Bull,* 3 Dallas, 386; *Sampereac* v. *United States,* 7 Peters, 222; *Freeborn* v. *Smith,* 2 Wall. 160; *Garrison* v. *New York,* 21 Wall, 196; *Freeland* v. *Williams,* 131 U. S. 405; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334. * * * In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, *since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes* if hereafter distributed, if the applicants [appellants] are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of the lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."
(Italics ours.)

3. The cases are uniform to the effect that a right of appeal, allowed by law at the time of the rendition of the judgment, may be taken away by a subsequent enactment. These decisions support the validity of Section 238a. A legal right to appeal from a judgment would seem to be quite as much of a vested right as a right to have the judgment remain unappealed from.

The following language was used by this court in *Railroad Co.* v. *Grant,* 98 U. S. 398:

> "A party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop

just where the rescinding act finds them, unless special provision is made to the contrary."

Similary, in *Campbell* v. *Iron-Silver Mining Co.* 27 C. C. A. 646, 83 Fed. 643, the Circuit Court of Appeals for the Eighth Circuit, sustains the abolition of a right of appeal, allowed at the time of the judgment.

To like effect is *Lake Erie & W. R. Co.* v. *Watkins*, 157 Ind., 600, 62 N. E., 443.

The following cases are in accord with the foregoing statements of the law:

*Eastman* v. *Gurrey*, 14 Utah 169, 46 Pac. 828;
*North Point Consol. Irr. Co.* v. *Utah & S. L. Canal Co.*, 14 Utah 155, 46 Pac. 824.
*People* v. *Scott*, 52 Colo. 49, 120 Pac. 126;
*Leavenworth Coal Co.* v. *Barber*, 47 Kan. 29;
*Fellows* v. *McHaney*, 113 Ark. 363, 168 S. W. 1099.

The right to appeal may be abolished even after the court has allowed the appeal and the case is pending in the appellate court.

*Ex parte McCardle*, 7 Wall. 506;
*U. S.* v. *Boisdores Heirs*, 8 How. 113;
*Gowen* v. *Busch*, 18 C. C. A. 572, 72 Fed. 299;
*Nelson* v. *Perkins*, 86 Conn. 425, 85 At. 686.

These are certainly strong decisions. The statutes involved seem to take away quite as much of a vested right

as does a statute giving an additional right of appeal after the time therefor under the old law has expired. The rule should of course, apply both ways—that litigants have no vested right in any particular remedy or rule of procedure.

4. Very similar to statutes granting a right of review as to judgments already final and unappealable are acts abolishing as grounds for the dismissal of pending appeals, or as grounds for new trials, certain defects in procedure. Such acts are consistently upheld. For example, a statute to the effect that the failure of the trial judge to sign the bill of exceptions shall not entitle the appellee to a new trial, may be applied to a case pending on motion for new trial, although such a defect was fatal prior to the statute.

*Johnson* v. *Smith*, 78 Vt. 145, 62 Atl. 9.

In the latter case the court says:

> "The procurement of a bill of exceptions, with a proper signature, for the consideration of this court, is one of the steps in the orderly progress of the case to its final determination. A statute which extends the means or opportunity of obtaining such a bill is remedial in its character and should be liberally construed. It extends, rather than restricts, the plaintiff's rights. It affects the remedy only, it is not repugnant to the statute, and it does not disturb a vested right; for there is no such thing as a vested right in a particular procedure."

The case of *Vallejo & U. R. Co.* v. *Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238, sustains, as applied to a pending appeal, a statute abolishing as a ground of reversal an improper admission or rejection of evidence, or a misdirection

of the jury, unless the upper court, after an examination of the entire record, deems that the error resulted in a miscarriage of justice. The court says:

> "It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence. *San Jose Ranch Co.* v. *San Jose, etc., Co.*, 126 Cal. 324, 58 Pac. 824. *An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular.* * * * This amended section is now in force and binding upon the Courts of Appeal. And as it effects the remedy only, it applies to pending appeals, although they may have been submitted prior to its adoption. A party has no contractual or vested right to have a judgment reversed because of an error which the court cannot say has produced what that section describes as a 'miscarriage of justice.' "

To much the same effect is the case of *Jacquins* v. *Commonwealth*, 9 Cush. 279, applying on appeal from a judgment rendered prior to its passage, the following statute:

> "Whenever a final judgment in any criminal case shall be reversed by the supreme judicial court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had."

See also *Blonde* v. *Menominee Bay Shore Lumber Co.*, 106 Wis., 540, 82 N. W., 552.

5. The proposition that a person in whose favor a judgment is rendered has a vested right in the various incidents attached to the judgment by the law then in force, certainly cannot be maintained. Appellees' position seems to involve such a contention.

A statute abolishing imprisonment for debt may constitutionally restrict rights acquired and vested under a prior judgment.

*Pennimans case,* 103 U. S. 714.

Similarly, property subject to sale on execution in support of an existing final judgment, may be exempted from sale by subsequent enactment, with the result that the right of enforcement is materially affected.

*Myers* v. *Field,* 146 Ill. 50, 34 N. E. 424;
*Laird* v. *Carton,* 196 N. Y. 169, 89 N. E. 822;
*Brearley School* v. *Ward,* 201 N. Y. 358, 94 N. E. 1001;
*Leak* v. *Gay,* 107 N. C. 468, 12 S. E. 312;
*Haizlip* v. *Haizlip,* 240 Mo. 392, 144 S. W. 851;
*Balance* v. *Gordon,* 247 Mo. 119, 152 S. W. 358;
*Sears* v. *Seaboard Air Line Ry.* 3 Ga. App. 614, 60 S. E. 343.

A very important case is that of *Freeland* v. *Williams,* 131 U. S. 405. In that case plaintiff obtained judgment against defendant in a state court of West Virginia on December 22, 1865, for the taking and conversion of certain cattle. On writ of error to the Supreme Court of

Appeals of the State, the judgment was affirmed in July, 1867. On August 22, 1872, West Virginia adopted a new constitution, containing the following section:

> "No citizen of this State who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

Thereafter, the original defendant brought this bill in equity against the plaintiff, to perpetually restrain the enforcement of said judgment, on the ground that the cattle were taken during the rebellion, according to the usage of civilized warfare. The court gave a decree as prayed. An appeal therefrom having been denied, the case is, on error to this court, affirmed. The court says:

> "The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this had been decided in this court are *Calder* v. *Bull*, 3 Dall. 386; *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sampeyreac* v. *United States*, 7 Pet. 222; *Watson* v. *Mercer*, 8 Pet. 88; and *Freeborn* v. *Smith*, 2 Wall. 160. In the latter case, Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in *Foster* v. *Essex Bank*, 16 Mass. 245: 'The truth is there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.'

Many other cases might be cited in which it was held that retroactive statutes, when not of a criminal character, though effecting the rights of parties in existence, are not forbidden by the Constitution of the United States."

The lien of a prior final judgment may be abrogated by statute.

*Snyder* v. *Brewing Co.*, 173 Ind. 659, 90 N. E. 314;
*Curry* v. *Landers*, 35 Ala., 280;
*Daily* v. *Burke*, 28 Ala., 328;
*U. S.* v. *Sturgis*, 14 Fed. 810.

The right to revive a judgment previously obtained may be abolished by statute, though such a right existed when the judgment was rendered.

*Bartol* v. *Eckert,* 50 Oh. St. 31, 33 N. E. 294;
*Gaffney* v. *Jones,* 44 Wash., 158, 87 Pac. 114.

The time within which the lower court may, for certain causes, vacate the judgment, may be extended by subsequent statute, enacted after the expiration of the period formerly allowed.

*Marston* v. *Humes,* 3 Wash. 267, 28 Pac. 520.

The following is an excerpt from the opinion in the latter case:

> "The said act amending section 109 did not go into effect until some 10 months after the rendition of the judgment in question, and it is contended by petitioners that, inasmuch as under said section 109, as it stood at the time of the rendition of their judgment, the relief thereunder was confined to five months, that at the expiration of that time their interest in said judgment became a vested one, so far as said section 109 is concerned; and that thereafter no amendment of said section could affect their rights. With this contention, however, I cannot agree. Their right in the judgment did not become vested until the court had lost all power to relieve against the same, whether under section 109 or any other provision of the Code; and not being vested, it was competent for the legislature to extend or change the time within which it could be attacked in the court where rendered by any legislation which it thought proper to effect such result."

The time for redemption from prior judgments may constitutionally be extended.

*Dunn* v. *Dewey*, 75 Minn., 153, 77 N. W. 793.

The right to interest on prior judgments, allowed by law at the time of their rendition, may be abolished by subsequent legislation.

*Morley* v. *Lake Shore, etc. Ry. Co.*, 146 U. S. 162, 13 S. Ct., 14;
*Read* v. *Mississippi County*, 69 Ark. 365, 63 S. W. 807, affirmed, 188 U. S. 739, 23 S. Ct. 849;
*Wyoming Nat. Bk.* v. *Brown*, 7 Wyo., 494, 53 Pac. 291.

6. The courts of last resort have sustained a great variety of retroactive statutes affecting, very materially, contract and property rights.

A statute abolishing the usury law may be taken as a typical example. A promissory note, unenforceable when made, because usurious, may be validated by a subsequent repeal of the usury statute. This court, in the leading case of *Ewell* v. *Daggs*, 108 U. S. 143, so states the law:

To the same effect are:
*Peterson* v. *Berry*, 125 Fed. 902;
*Coe* v. *Miller*, 77 So. 88 (Fla)

In like manner, contracts and deeds unenforceable (or even void) when entered into because of some failure

to comply with legal requirements, may be given validity by subsequent statutes changing or repealing the statutes in force at the time of their execution.

*Satterlee* v. *Matthewson,* 2 Pet. 380;
*Watson* v. *Mercer,* 8 Peet. 88;
*Randall* v. *Kreiger,* 23 Wall. 137;
*Gross* v. *U. S. Mortgage Co.,* 108 U. S. 477;
*West Side Belt Ry.* v. *Pittsburg Construction Co.,* 219 U. S. 92, 31 S. Ct., 196;
*Jenkins* v. *Union Savings Assn.,* 132 Minn., 19, 155 N. W. 765;
*Clark* v. *Dorr,* 156 Ind., 692, 60 N. E. 688;
*Sullivan* v. *Ammons,* 95 Miss., 106, 48 So. 244.

The leading cases on the point are reviewed by the court in *West Side Belt Ry.* v. *Pittsburg Construction Co.,* 219 U. S. 92, 31 S. Ct., 196, to which reference is especially made.

Of like effect are curative statutes, validating defects in prior municipal bond elections. Such statutes are held to be constitutional, although, but for them, the bonds would be unenforceable. In *Camp* v. *State,* 71 Fla., 381, 72 So. 483, the court, in upholding such a statute, declines to follow the contention that it divests vested rights.

This court in *Utter* v. *Franklin,* 172 U. S. 416, 19 S. Ct. 183, sustained the constitutionality of a subsequent statute curing defects in a municipal bond issue, although prior to the passage of the act the bonds had been adjudged void by this court.

A void marriage may be rendered valid by a statute subsequently enacted, even though vested property rights are thereby affected.

*Goshen* v. *Stonington*, 4 Conn., 209.

An unlicensed physician, unable to recover the value of the services rendered by him, by the law in force at the time of their performance, may acquire such a right by a change in the law.

*Hewitt* v. *Wilcox*, 1 Metc. (Mass) 154.

An occupying claimant statute, giving to occupying claimants the right of reimbursement for improvements made on the land, may be applied retroactively with respect to improvements as to which no such right previously existed.

*Claypoole* v. *King*, 21 Kan., 602.

The following decisions uphold similar types of retroactive statutes affecting property interests:

*Independent School Dist.* v. *Smith*, 181 N. W. 1 (Ia.)
*Scales* v. *Otts*, 127 Ala., 582, 29 So. 63;
*Royston* v. *Miller*, 76 Fed. 50;
*Boss* v. *Roanoke Navigation Co.*, 111 N. C. 439, 16 S. E. 402.

In *Legal Tender Cases,* 110 U. S. 421, an Act of Congress making United States treasury notes legal tender for the payment of private debts is held to be constitutional, as to debts incurred both before and after its passage.

The case of *Foster* v. *Essex Bank,* 16 Mass., 245, is a leading case with respect to the validity of a statute which continued certain corporations in existence for a period of three years after their charters would otherwise have expired, for the purpose of suing and being sued. It was ably argued that such a statute was invalid, as an impairment of vested rights, but the court upheld the Act. The court, at page 273 of the opinion, says:

> "Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration. The statutes of limitation, operating upon contracts already in force:—The suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period:—The statutes made for curing defects in the proceedings of courts, towns, officers, etc., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a legislatnre, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

The same court, in *Converse* v. *Ayres,* 197 Mass., 443, 84 N. E. 98, in sustaining a statute giving judgment cred-

itors of corporations greater rights as against stockholders, says:

> "It thus being obvious that as the law stood, while resident stockholders could be made to respond, foreign stockholders escaped, further legislation was enacted to supplement existing statutes, by providing a form of procedure which would remove the jurisdictional difficulty."

A statute very similar to the one involved in the above case was upheld in *Moore* v. *Riply*, 106 Ga., 556, 32 S. E. 647.

7. It is well established that a statute cutting down the period of a prior statute of limitations may apply to existing rights of action.

> *Terry* v. *Anderson*, 95 U. S. 628;
> *Koshonong* v. *Burton*, 104 U. S. 668;
> *Wheeler* v. *Jackson*, 137 U. S. 245.

Furthermore, it is the established law in this court, and in many state tribunals, that an act is valid which removes the bar of a statute of limitations the period of which has expired. *Campbell* v. *Holt*, 115 U. S. 620, is the leading case on the point. The reasoning of the court is as follows:

> "It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.
>
> It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporate hereditaments. But when he got beyond this although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad* v. *Blossburg and Corning Railroad,* 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

There was a similar holding by this court in *Stewart* v. *Kahn,* 11 Wall. 493, with respect to the Act of June 11, 1864, suspending the running of the statute of limitations during the Civil War. The court says:

"A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us, that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time

of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitues the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purpose of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were calleed to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislature of this character. We are of the opinion that the meaning of the statute is that the time which elapsed while the plaintiff could not prosecute his suit, by reason of the rebellion, whether before of after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived."

The Federal Transportation Act of February 28, 1920, paragraph f, of section 206, provides:

> "The period of federal control shall not be computed as a part of the period of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control."

In *Standley* v. *United States Railroad Administration* (D. C. Ohio), 271 Fed. 794, it was held that the above provision was applicable to a cause of action which was fully barred under the law as it stood in Ohio before the approval of the Transportation Act. The court, said (p. 795):

> "This language applies to plaintiff's cause of action, and admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation. * * * Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statutes of limitations 'aganst causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. *Campbell* v. *Holt*, 115 U. S., 620; 12 Corpus Juris, p. 780, Section 576."

A like conclusion with respect to the same federal statute was reached in *Wenatchee Produce Co.* v. *Great Northern Ry. Co.* (D. C. Wash.) 271 Fed. 784.

The following state decisions, among others, are to the same effect:

*Danforth* v. *Groton Water* Co., 178 Mass. 472, 59 N. E. 1033;

*Jackson Hill Coal & Coke Co.* v. *Board of Commissioners* 181 Ind. 335, 104 N. E. 497.

In *Hinton* v. *Hinton*, 61 N. C. (1 Phil. L. ) 410, it was held that a statute giving a widow six months in which to dissent from the provision of a will and elect to take dower as at common law, does not confer a right of dower, but is a statute of limitations upon that right, and therefore that a later statute extending the time for such dissent, is constitutional, and applies to a case barred before its passage.

8. The foregoing decisions, cited under subdivision II of this memorandum, seems to establish a proposition of law which should be conclusive of this controversy. That proposition is variously stated in the cases. It appears in the following forms, among others: "There is no such thing as a vested right to do wrong;" "There is no vested right to defeat a just debt;" "A vested right is one of which a person cannot be deprived without injustice;" "A party has no vested right in a defense based upon an informality not affecting his substantial equities;" "There is no vested right in a remedy or rule of procedure;" "The theory of vested rights does not prevent the curing of mere irregularities." None of these formulae can be applied, in a rule of thumb fashion, to a particular statute, as a definite unanswerable test of constitutionality. Certain difficulties of application are inherent in them all. At the basis of them all, however, there is a real principle of law. Justice Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts, in the case of *Danforth* v. *Groton Water* Co., 178 Mass., 472, 59 N. E. 1033, summarized the cases, and the rule established by them, as follows:

> "But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

The decision in *Danforth* v. *Groton Water Company* is so precisely in point here that the entire opinion may be referred to as supporting the position of appellants *in toto*. Justice Holmes has rightly deducted from the cases the real principle at their basis. Under that principle, the power of Congress to enact Section 238-a of the Judicial Code really depends upon the equity, or moral worth, or substantial justice of such legislation as set over against the moral worth or value of the right which the statute takes away.

There is little substantial moral worth in the right which appellees are asserting. If the judgment below be a proper one, appellees will not be injured by a further review of the case. If that judgment is wrong and should be reversed, no equitable right is denied by rehearing and reversal.

On the other hand there are very strong equities in favor of the statute. The language of Chief Justice Taft quoted at the beginning of this brief characterizes as a "trap" the condition existing before the enactment of the statute. The contention of appellees is that while Congress may properly provide relief for appellants who have not yet fallen into the "trap" no help can be extended to an unfortunate victim already entrapped. Certainly every in-

tendment should be made in favor of a statute intended to prevent a miscarriage of justice in a matter of simple appellate procedure.

A very able article by the Hon. Charles W. Bunn, of St. Paul, Minnesota, with respect to the appellate jurisdiction of this court, appearing in the Harvard Law Review for June, 1922, at page 902 begins as follows:

> "The jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is far from that."

The court should not make litigants suffer from this ambiguity in the statutes in the absence of a clearly compelling consideration. There is certainly no justice in penalizing the appellant to the extent of the loss of his entire cause of action, because his attorney cannot determine from the prior decisions of this court whether the appeal should be brought here or go to the Court of Appeals.

9. Much is made by appellees of the fact that the appeal to the Circuit Court of Appeals was not taken until after the expiration of the three months' period for an appeal to the Supreme Court. There is nothing whatever in this point. If, as contended by appellees, the appeal to the Court of Appeals was a nullity, then it could have made no difference that such appeal was attempted prior to the expiration of the three months rather than thereafter. In either event, under the contention, there would have been no *real* appeal, and hence the judgment would have been unappealed from during the allowed time. The time

of the appeal to the Court of Appeals is entirely immaterial.

This court has already sustained the validity of section 238-a as applied to a pending appeal to the wrong court in a criminal case, in *Heilter* v. *United States,* 43 Sup. Ct. 185. This decision seems to be a direct authority for denying the motion to dismiss herein. Chief Justice Taft, rendering the opinion of the court in that case, says of Section 238-a:

> "This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress."

The judgment below in that case was entered more than sixteen months before the approval of Section 238-a, yet the court applies the section and transfers the case to the proper court.

## III.

The sole basis for the motion to dismiss is the claim that Section 238-a is unconstitutional as applied to the present appeal. The determination of this question in favor of appellee would dispose of the appeal without an opportunity for a hearing on the merits. This is the situation in both the Abernathy and Hagerman cases pending here. The third case, involving identical questions on the merits, was retained by the Court of Appeals because of a diversity of citizenship which did not appear in the Abernathy and Hagerman cases. It has been argued in that court, and will without doubt come to this court after decision there.

In view of the gravity of the constitutional question and of the recognized policy of this court not lightly to set aside acts of Congress, we respectfully request an opportunity to argue orally the motion to dismiss, and also the motion to remand, by special assignment, or if that be impossible, then at the argument on the merits. If our position can be made clear to the court, we believe there can be no question but that jurisdiction will be retained.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
ARTHUR MILLER,
SAM'L J. MCCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
*Attorneys for Appellants.*

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[redacted]MILLAN CONTRACTING COMPANY, A CORPORATION, AND [redacted] NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

E. HAYWOOD HAGERMAN, APPELLEE.

[redacted]

## INDEX.

No. 737.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

## APPELLEE'S MOTION TO DISMISS APPEAL.

B. Haywood Hagerman, the above appellee appearing especially for the purpose of this motion only and for no other purpose, and without an intention of appearing generally and without intention to waive the question of the jurisdiction of this Honorable Court, comes now and moves the court to dismiss the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank & Trust Company of Kansas City, a corporation, appellants, herein and as grounds for the said motion assigns the following, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western Division of the Western District of Missouri for the sole and only purpose of having certain alleged special taxes upon the land of the complainant in Kansas City, Missouri, purporting to have been levied under the laws of the State of Missouri, adjudicated and declared illegal, null and void, because the enforcement of such alleged special taxes would deprive the complainant below (appellee here) of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. A copy of the amended bill of complaint under which said suit was tried is included in the transcript of the said cause heretofore filed in this court to which reference is hereby made.

2. The jurisdiction of the said United States District Court in said cause rested solely and only upon an attack by appellee (complainant below) upon a state statute and the provisions of the charter of Kansas City; because of their alleged violation of, and their alleged conflict with, the Fourteenth Amendment of the Constitution of the United States.

3. That on the 7th day of July, 1921, the aforesaid District Court of the United States rendered and entered of record, a final judgment and decree in favor of this appellee (complainant below) adjudging said alleged special taxes upon the property of the appellee (complainant below) to be null and void, as being issued contrary to and in violation of the provisions of the Con-

stitution of the United States, particularly the Fourteenth Amendment thereof.

4. That thereafter, and on January 4th, 1922, the appellants, McMillan Contracting Company, a corporation and Fidelity National Bank & Trust Company, a corporation, filed a petition for appeal from said final judgment to the United States Circuit Court of Appeals in and for the Eighth Circuit; and the said District Court on the said 4th day of January, 1922, contrary to the statute fixing time for allowing appeals made and entered of record, an order allowing said appeal to said United States Circuit Court of Appeals.

5. That thereafter there was filed in said United States Circuit Court of Appeals in this cause, by this appellee, a motion to dismiss said purported appeal for want of jurisdiction; and thereafter the said United States Circuit Court of Appeals did, by order, transfer the said purported appeal to this court, as the court in which said purported appeal was returnable, if taken in time.

6. That by virtue of the facts as herein stated and as shown by the transcript of said cause now filed in this court, this court did not and could not, acquire jurisdiction over said cause by virtue of the said attempted appeal.

Wherefore, the appellee prays this Honorable Court to make an order dismissing said purported appeal.

ALBERT S. MARLEY,
*Attorney for Appellee.*

No. 737.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

## MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

The jurisdiction of the United States District Court in and for the Western Division of the Western District of Missouri in this cause, rested solely upon the alleged violation of the Constitution of the United States, more particularly the fourteenth amendment thereof, in the levying of special taxes under the laws of the State of Missouri upon the property of the complainant in Kansas City, in said state.

Paragraph 3 of the amended bill of complainant upon which this decree was based alleges the following:

"That the controversy herein arises under and involves the construction of the Constitution of the United States and particularly the Fourteenth Amendment of said Constitution as hereinafter specifically shown."

And paragraphs 13 and 14 of the said first amended bill of complaint alleges:

13. That said Ordinance No. 21831, and said assessment attempted to be made against said property of said complainant, and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional null and void, for the reason that they and each of them if enforced, will deprive complainant of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the said property although located a great distance from said boulevard, is, pursuant to said ordinance and said assessments, sought to be charged with the same benefits, and in the same proportion as property immediately abutting upon said boulevard, and which is necessarily specially benefited greatly in excess of all property which does not adjoin and abut upon said boulevard, and especially property located as that of complainant at a great distance from said boulevard, thereby depriving complainant of the equal protection of the law in violation of Section 1 of Fourteenth Amendment to the Constitution of the United States in that said Section 28 of Article VIII, and said ordinance, and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this complainant, or his predecessor in title, any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading among the various tracts of property in the benefit district, and com-

plainant's predecessor in title and complainant had no notice or opportunity to be heard in relation to the value at which their property was assessed by the city assessor, nor as to the amount of benefits, if any, accruing to it, by reason of said improvements, but that said section of said Charter and said Ordinance provide for an arbitrary and unfair and discriminating method of apportionment as hereinbefore shown, all of which is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States as hereinabove set forth, and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with the cost of said work or against this complainant, as required by said charter and by said ordinance, as aforesaid.

14. Complainant further states that the pretended benefit district described in and fixed by said Ordinance of Kansas City Mo., 21831, was unreasonable, discriminating, arbitrary and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work upon the land of complainant; a large amount of land, including the said tract of complainant, lying a long distance north of and not abutting or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard, was left wholly out of said benefit district and was not assessed at all for such grading. Complainant further states that the benefit district described in said Ordinance No. 21831, was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and

benefit, while, as a matter of fact, the improvement was not of a local nature but was designated to be and is of a general nature and for the general public benefit, as aforesaid: Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty (220) to five hundred (500) feet in width and it is not appropriate, necessary or useful to nor a peculiar local benefit to the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted surburban lands, as aforesaid. And, although said Meyer parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the Charter of Kansas City."

The learned chancellor, in a memorandum opinion, stated, among other things, the contention of complainants. In his statement of such contentions the learned chancellor says:

"Many points are urged by the complainants against the regularity of the proceedings and the validity of the tax bills. It is claimed that the method of apportionment provided for in Section 28 of Article 8 of the Charter is fundamentally so unfair and unjust as to result in the taking of property without due process in violation of the Fourteenth Amendment of the Federal Constitution; that the tax assessed against the property in question exceeds special benefits received to

> such an extent as to result in the taking of the property without due process; that this is a general public improvement and not a local one; that the benefit district is unreasonable; that the Circuit Court proceedings is an essential step in the grading procedure and was not followed with sufficient strictness in that, a suit was not brought in the name of Kansas City and that the parties charged were not named; that that proceeding was in fact, a moot one without recognition in the judicial procedure of the state, binds no one and that the decree entered cannot be urged as *res adjudicata;* they also claim that the benefits were not apportioned equitably and with due regard for actual benefits * * * but the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of this grading; this would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district; therefore an arbitrary assessment was made, presumably with the assistance of the same assessor who makes the assessment for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation * * * I find for the reasons stated as disclosed by the record, that both the benefit district and the assessment were arbitrary and unreasonable and that the tax bills unreasonably, exceed any possible benefit to this restricted benefit district.

And in the same opinion, the said learned chancellor further says that the "relief prayed by the petitioners will be granted and decrees to that effect may be prepared and entered."

In conformity with the said opinion of the learned chancellor, he did, on the 7th day of July, 1921, sign,

file and enter of record, a final decree granting the relief prayed for pursuant to his memorandum opinion.

On the 4th day of January, 1922, the appellants herein, applied for and were allowed, an appeal in this cause to the United States Circuit Court of Appeals for the Eight Circuit and on the same day filed in this cause, their assignment of errors, assigning among things, the following errors:

> "The court erred in ruling that the benefit district was arbitrary and unreasonable."
>
> "The court erred in ruling that the assessment was arbitrary and unreasonable."
>
> "The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question."
>
> "The court erred in holding that the tax bills unreasonably exceeded the benefit or any possible benefit to the lands in question."
>
> "The court erred in holding that the improvement in question was in its nature a general public improvement rather than a local improvement."
>
> "The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable."
>
> "The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills."
>
> "11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy."

Upon the filing of the transcript of record in this cause in the United States Circuit Court of Appeals for the Eighth Circuit, the appellee herein, did file his

motion to dismiss the said purported appeal for want of jurisdiction in the said Circuit Court of Appeals; and the said Circuit Court of Appeals did, thereupon order the transcript of the record in this cause to be certified to this court, holding in a *per curiam* opinion that the United States Circuit Court of Appeals has no jurisdiction and also holding as follows (284 Fed. Rep. 354):

> "Our attention has been called to the Act of Congress approved September 14, 1922, adding Section 238a to the Judicial Code, which reads as follows:
>
> 'If an appeal of writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ or error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to or issued out of, the court to which it is so transferred.'
>
> "Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months, after the entry of the decree (Sec. 6, Ch. 448, 39 Stats. 726) and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered

transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States."

Filed October 23, 1922.

Section 238 of the Judicial Code (Sect. 1215 compiled statutes 1918) fixed the appellate jurisdiction of the United States Supreme Court in the following language:

> "*Appeals and writs of error from United States District Courts.* Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case, the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States (J. C. 238; Acts March 3, 1891, c. 517, 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, 35, 31 Stat. 85; April 30, 1900, c. 339, 86, 31 Stat. 158; March 3, 1909, c. 269, 1, 35 Stat. 838; March 3, 1911, c. 231, 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, 2, 38 Stat. 804.)

And the Acts of Congress approved Sept. 6th, 1916, fixes the time in which appeals to the Supreme Court

shall be allowed or writs of error granted, to three months and prohibits the granting of an appeal or the allowing of a writ of error at any time beyond three months, using the following language:

> "*Time for application for writ of error, appeal or certiorari*: No writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, that writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months (Act Sept. 6, 1916, c. 448, 6, 39 Stat. 727).

It clearly appears from the record on file in this court, that the sole and only ground of jurisdiction of the Federal Trial Court was that a Federal constitutional question, was directly involved; and for that reason, the United States Supreme Court was and is the only court having appellate jurisdiction.

In support of this proposition we desire to call the court's attention to the following authorities:

*L. & N. R. R.* v. *Greene*, 244 U. S. 527.
*Lemke* v. *Farmers Grain Co.*, 42 U. S. S. C. R. 244 (decided Feb. 27th, 1922).
*Raton Water Works Co.* v. *City of Raton*, 249 U. S. 252.
*South Carolina Glass Co.* v. *South Carolina*, 240 U. S. 318.
*Union & Planters Bank* v. *Memphis*, 189 U. S. 71.

*City of New York* v. *Gas Company*, 253 U. U. S. 219.
*Vicksburg* v. *Water Works Co.*, 202 U. S. 453.
*443 Cases of Eggs* v. *U. S.*, 226 U. S. 172.
*Siler* v. *L. & N. R. R.*, 213 U. S. 192.
*Amer. Sugar Refin. Co.*, 181 U. S. 277.
*Huguley Mfg. Co.* v. *Cotton Mills*, 184 U. S. 290.
*Brolen* v. *U. S.*, 236 U. S. 216.
*Sugaman* v. *U. S.*, 249 U. S. 189.

In *Lemke* v. *Farmers Grain Company*, 42 U. S. S. C. R. 245, decided Feb. 27th, 1922, this court says:

> "At the threshold we are met with a question of the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court: It is well settled that when the jurisdiction of the District Court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to this court is the only method of review. Section 238, Judicial Code (Comp. St. Sec. 1215). *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 36 Sup. Ct. 293, 60 L. Ed. 658, and cases cited."

and in *Raton Water Works Company* v. *City of Raton*, 249 U. S. 552, the memorandum opinion by The Chief Justice is not lengthy and is as follows:

> "The certificate states that in a cause pending before it on appeal from the District Court, the jurisdiction of the court below to entertain the cause on appeal was questioned on the ground that the judgment of the District Court was exclusively susceptible of being reviewed by direct appeal to his court: The certificate further states that the parties to the cause in the District Court were both

corporations of New Mexico and the jurisdiction of the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

Resulting from these conditions the question which the certificate propounds is this: 'Has this court (the Circuit Court of Appeals) jurisdiction of the appeal?' The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question, the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive power to review was vested in this court. Judicial Code Secs. 128, 238; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277-281; *Huguley Manufacturing Company* v. *Galeton, Cotton Mills*, 184 U. S. 290, 295; *Union & Planters Bank* v. *Memphis*, 189, U. S. 71, 73; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Caroline Glass Co.* v. *South Carolina*, 240 U. S. 305, 318.

A negative answer to the question propounded is therefore directed.

And it is so ordered."

So also in *Carolina Glass Co.* v. *South Carolina*, 240 U. S. l. c. 318, the Supreme Court says:

"This writ brings up a judgment rendered by the Circuit Court of Appeals, fourth circuit, affirming the same final judgment of the District Court considered in No. 205 *supra*, 206 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

> In such circumstances the Circuit Court of Appeals is without jurisdiction to review, *Union & Planters Bank* v. *Memphis,* 189, U S. 71, 93. Its judgment is accordingly reversed and the cause remanded with directions to dismiss the writ of error improperly entertained."

In *Union & Planters Bank* v. *Memphis,* 189 U. S. 71, the Supreme Court through Mr. Chief Justice Fuller says on page 73:

> "Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3rd, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company* v. *New Orleans,* 181 U. S. 277."

To the same effect is *American Sugar Refining Company* v. *New Orleans,* 181 U. S. 277.

As clearly appears by Section 1228-a of the Judicial Code, Congress has forbidden the issuance of writ of error or writ of certiorari or the allowance of an appeal intended to bring up to this court for review the action of a trial court, unless such writ or appeal is applied for within three months after the entry of the judgment or decree complained of.

The record shows that the decree was entered on July 7th, 1921, so that after the 7th day of October, 1921, the decree in this case became final and the appellee at once became possessed of a vested right in and to the decree granting him the relief asked for in his bill

of complaint. The record also shows that the application for an appeal was made on January 4th, 1922, long after the right of appeal had been lost; and even then it was asked and allowed to the United States Circuit Court of Appeals, which had no jurisdiction in any event.

The appellee contends that the statutory time in which an appeal must be taken and perfected is jurisdictional and cannot be extended by the court and in support of that contention he calls this Honorable Court's attention to the following authorities:

*Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541.
*London Credit Co.* v. *R. R.*, 128 U. S. 258.
*Conroy* v. *Bank*, 203 U. S. 141.
*113 cases of eggs* v. *U. S.*, 226 U. S. 172.
*Farrar* v. *Churchill*, 135 U. S. 609.
*Title Guarantee Co.* v. *U. S.*, 222 U. S. 401.
*U. S.* v. *Curry*, 6 Howard 106.
***Iron Works*** v. *Sater*, 223 Fed. 611.
***Blaffer*** v. *Water Co.*, 160 Fed. 389.
*Kentucky Coal Co.* v. *Hawes*, 153 Fed. 163.
***Rutan*** v. *Johnson*, 130 Fed. 109.
*Lagan* v. *Goodwin*, 101 Fed. 654.
*In re Goodwin*, 101 Fed. 920.
*Brewster* v. *Evans*, 93 Fed. 628.
*Norman* v. *Chester Park Club*, 93 Fed. 576.
*Green* v. *Lynn*, 87 Fed. 839.
*Condon* v. *L. & T. Co.*, 73 Fed. 907.

We feel in view of the foregoing statutes and the foregoing decisions, that this court has no jurisdiction over this purported appeal, and that the appellee's motion to dismiss the appeal should be sustained, but the ap-

pellants are apparently invoking an Act of Congress approved September 16, 1922, which adds an amendment to Section 238 of the Judicial Code, which amendment is to be known as Section 238-a, and it is set out in the excerpt from the opinion of the United States Circuit Court of Appeals in the Eighth Circuit, in this case.

In response to that contention the appellee respectfully urges upon the attention of this Honorable Court, the fact that the appellee's rights became vested on October 7th, 1921, and it was not the intention of Congress to make the Act in question retroactive and the act is not capable of a retroactive construction, but even if it was capable of such construction and even if Congress intended it should be retroactive, then such an act with such a construction would be unconstitutional, null and void and violative of the fifth amendment of the Constitution of the United States.

Citizens of the United States are, by the fifth amendment of the Constitution of the United States, protected against the deprivation of their property, life or liberty, without due process of law and no act of Congress or legislative fiat can impair or destroy a vested right or title to property and certain it is, no act of Congress or legislative fiat constitutes a due process of law.

See *Chase* v. *U. S.*, 222 Fed. Rep. 593, citing:
*Choat* v. *Trapp*, 224 U. S. 665.
*Jones* v. *Mechan*, 175 U. S. 1.
*In re. Heff*, 197 U. S. 488.
*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294.
*Chase* v. *U. S.*, 222 Fed. 593.

*Lowry* v. *Weaver*, 4 McLain, 82.
*Wilson* v. *Wall*, 6 Wallace, 89.
*Reichert* v. *Felps*, 6 Wall. 160.
*U. S.* v. *Askervik*, 180 Fed. 137.
*U. S.* v. *Ry.*, 165 Fed. 742.
*Jackson* v. *Goodell*, 20 Johns 188.
*Taylor* v. *Drews*, 21 Ark. 485.
*Lewis* v. *Webb*, 3 Greenleaf 326.
*Wash Rd. Co.* v. *Alexandria Co.*, 20 Gratton (Va.) 31.
*Davis* v. *Menasha*, 21 Wisc. 490.
*Willoughby* v. *George*, 5 Colo. 80.
*Baupre* v. *Hoerr*, 3 Minn. 366.
*Wilson* v. *School Dist.*, 22 Minn. 488.
*Taylor* v. *Place*, 4 R. I. 324.
*San Mateo Co.* v. *Ry.*, 13 Fed. 151.
*Murray* v. *Land Co.*, 18 How. 277.

Judge Wolverton in *United States* v. *Aakervik*, 180 Fed. 143, has discussed the proposition and so clearly stated the rule that we will presume upon the patience of this Honorable Court, and set out the following excerpts from the opinion, written by him, to-wit:

> "When therefore, the term is at an end without the appropriate initiation of an available proceeding to revise or set aside the court's final judgment or decree, and no appeal or other means of review is prosecuted within the time afforded by authoritative regulations, such judgment or decree becomes an absolute finality, forever binding upon the parties and their privies, utterly without power of change, revision, revocation, or relief within the cause or proceeding in which it is rendered."

And further the judge says:

> "This brings us to the last contention, namely, that the Act of Congress, so far as it authorizes

the impeachment of the court's judgment for fraud consisting of perjury in obtaining the judgment or for error in the court in determining the cause upon the evidence before it, is unconstitutional, as trenching upon the legitimate domain of the judiciary, and as unseating settled rights of individuals retrospectively. A judgment once rendered, if concerning property rights, settles them as between the litigants, or, if touching the status of either property or the person, determines that, the court possessing proper jurisdiction, and is and ought to be the end of litigation and the law, unless set aside or revised by some authoritative method known also to the law. Now, it is insisted that, under the long-established and well settled court practice, this judgment, declaring the respondent to be a citizen of the United States, had been fixed beyond the power of the court, to change, or to modify or set it aside, and that the Act of Congress authorizing the court again to review it is, in purpose and effect, authorizing a retrial, and thus to vacate the judgment, a thing that the court could not do previously. The Supreme Court has determined that an Act of Congress cannot annul a judgment of the Supreme Court, or impair the rights determined thereby, as respects adjudications upon the private rights of parties, and applied the principle as it pertained to a matter of costs, while it was held that the principal controversy did not come within the rule. *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435. And in *United States* v. *Klein*, 13 Wall. 128, 20 L. Ed. 519, the Supreme Court declared that Congress was unauthorized to deny to pardons granted by the President the effect which the court had previously adjudged them to have. The case was pending on appeal from the Court of Claims, and the effect of the legislation was to require the court to dismiss the appeal and

proceed no further in the case, and this although the Court of Claims had declared for the claimant upon the very evidence which Congress declared should have a certain contrary effect when brought to the attention of the appellate jurisdiction. Further than this, a previous case (*United States* v. *Padelford,* 9 Wall. 531, 19 L. Ed. 788), of like import, had been appealed to the Supreme Court, wherein the Court of Claims was affirmed and thus the effect of the President's pardons had been judicially determined. After stating the facts of the case more fully than here the court says:

'It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease, and it is required to dismiss the cause for want of jurisdiction.'

The great weight of authority elsewhere seems to determine the matter in accord with the contention. Mr. Black states the doctrine sought to be invoked thus:

'The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the Legislature. While a statute may indeed declare what judgment shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would

be an unwarranted invasion of the province of the judicial department. 1 Black on Judgments 298.'

Mr. Cooley is as explicit. He says:

'It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.' Cooley's Constitutional Limitations (6th Ed.) p. 111."

In *De Chastellux* v. *Fairchild*, 15 Pa. 18, 20, 53 Am. Dec. 570, it is said:

"If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the court to order it either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them."

So again, in *State* v. *New York, N. H. & H. R. Co.*, 71 Conn. 43, 49, 40 Atl. 925, 928, the court says:

"The judgment is the final and supreme act of judicial power. The Legislature cannot overturn judgments, any more than the judiciary can make laws. A judgment is based upon established rules and principles administered by the judiciary."

In *Roche* v. *Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533, it is distinctly held that an act, so far as it authorizes a court to change the effect of decrees which before its passage had become final, is an exercise of judicial power by the Legislature, and is unconstitutional. This decision was given on a rehearing, and the question was exhaustively considered.

And again the court says in *Re Handley's Estate*, 15 Utah, 212, 220, 49 Pac. 829, 831 (62 Am. St. Rep. 926):

> "The court having tried the case, construed the law in force at the time; and, having applied it to the facts, and entered a final decree, the Legislature could not afterwards, by a declaratory or explanatory act as to that case, give to the law a different construction, requiring a different decree, and invent a new remedy or change the old one, and require the court to retry the case and enter a new decree according to its new construction, and new and changed remedy."

So in *Atkinson* v. *Dunlap*, 50 Me. 111, 116 the court says:

> "That the Legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited."

So, also, it is said in *Martin* v. *South Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591, 592:

> "The Legislature within certain limitations may alter and control remedies by which litigants assert their rights in the courts, but when the liti-

gation has proceeded to judgment or decree upon the merits of the controversy, it has passed beyond its power."

See also, to a like purpose:

*Sparkhawk* v. *Sparkhawk*, 116 Mass. 315.
*Griffin's Ex'r.* v. *Cunningham*, 20 Grat. (Va.) 31.
*Davis and another* v. *Village of Menasha and others*, 21 Wis. 497.
*State* v. *Flint*, 61 Minn. 539, N. W. 1113.

As is said by Judge Field in the San Mateo County case and as indicated by the foregoing decisions, the Fifth Amendment of the Constitution of the United States is applicable to the Federal law and is the same character and receives the same construction as the 14th Amendment of the Constitution of the United States as applicable to the various states of the Union and we respectfully call the court's attention again to the foregoing Federal decision and the following decisions by the various courts.

*Plahn* v. *Gibernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915).
*Atkinson* v. *Dunlap*, 50 Me. 111.
*Burch* v. *Newberry*, 10 N. Y. 374.
*Carleton & Slade* v. *Goodwin*, 41 Ala. 153.
*Johnson* v. *Gebhauer*, 159 Ind. 271.
*Blair* v. *Miller*, 4 Dallas 21.
*Dyer* v. *Belfast*, 88 Me. 140.
*Marpole* v. *Cather*, 78 Va. 239.
*Ford* v. *Lenander*, 145 Ia. 107.
*Weiland* v. *Shillock*, 24 Minn. 348.
*Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. loc. cit. 368.
*Sydnor et al.* v. *Palmer*, 32 Wis. 408.

*Town of Lancaster* v. *Barr*, 25 Wisc. 562.
*Blakeley & Copeland* v. *Frazier*, 15 S. Car. 615.
*Weaver* v. *Lapsley*, 43 Ala. 226.
*McCabe* v. *Emerson*, 18 Pa. St. 112.
*Greenwood* v. *Butler*, 52 Kans. 428.
*Gilman* v. *Tucker*, 128 N. Y. 204.
*State of Pa.* v. *Bridge Co.*, 18 Howard 431.
*Cassard* v. *Tracy*, 52 La. Ann. 848 (l. c.).
Cooley on Constitutional Limitations 7th Ed. p. 138 (and notes) p. 521 (and note).
*Ratcliff* v. *Anderson*, 31 Gratton (Va.) 105.
*Hill* v. *Town of Sunderland*, 3 Vermont 509.
*Roche* v. *Waters*, 72 Md. 272.
*Wilson* v. *School District*, 22 Minn. 488.

In *Plahn* v. *Givernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915), l. c. 145-146, the New Jersey Court says:

> "The decree having established a property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. This is the doctrine declared by the Court of Appeals of New York in *Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. 362, and by the Supreme Court of Maine in *Atkinson* v. *Dunlap*, 50 Me. 111. It is fully supported by the reasoning of Chief Justice Beasley in the opinion delivered by him in our Supreme Court in *Ryder* v. *Wilson's Executors*, 41 N. J. Law, 10, and by that of Justice Dixon, speaking for this court, in the case of *Moore* v. *State*, 34 N. J. Law, 203, and meets with our entire approval. We are not to be understood as denying the power of the Legislature to extend the time to appeal before that right had expired by limitation. What we do determine is that a statute like that which we have

been discussing is unconstitutional, so far as it operates to revive a right of appeal after it has expired under the then existing law, and property rights have thereby become vested."

We respectfully urge that upon the face of the record this Honorable Court is without jurisdiction over the purported appeal in this cause and that the said purported appeal should be by this court dismissed.

All of which is respectfully submitted.

ALBERT S. MARLEY,
*Attorney for Appellee.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

---

McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

*Appellants.*

v.

No.

B. HAYWOOD HAGERMAN,

*Appellee.*

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## Appellants' Motion to Remand and Memorandum in Support Thereof.

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JUSTIN D. BOWERSOCK,
ARTHUR MILLER,
SAM'L J. MCCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
*Attorneys for Appellants.*

John C. Bovard, Printer, 809 Baltimore Ave., Kansas City, Mo.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

---

McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

*Appellants.*

v.

No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

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## NOTICE OF APPELLANTS' MOTION TO REMAND.

To B. Haywood Hagerman, Appellee, and to Albert S. Marley, his attorney of record:

You and each of you are hereby notified that on Monday, the ~~2nd~~ 16th day of April, 1923, at the convening of Court or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States, a motion to remand the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, and memorandum in support thereof. A true copy of

appellants' motion to remand and of the memorandum in support thereof are hereto attached and made a part hereof.

JUSTIN D. BOWERSOCK,
ARTHUR MILLER,
SAM'L J. MCCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
*Attorneys for Appellants.*

Service of the foregoing notice and a copy of the motion to remand and memorandum in support thereof therein referred to is hereby acknowledged this 27th day of March, 1923.

ALBERT S. MARLEY,
*Attorney for Appellee.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

---

McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

*Appellants,*

v.

No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

---

## APPELLANTS' MOTION TO REMAND.

Come now the appellants above named and respectfully move the Court to remand this cause to the United States Circuit Court of Appeals for the Eighth Circuit, for the following reasons, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western District of Missouri, for the purpose of having certain tax bills, issued by Kansas City, Missouri, adjudged null and void and to have them removed as a cloud on appellee's title, upon three grounds set up in the bill: That the Charter of Kansas City and the ordinance authorizing the issuance of the bills are in contravention of the

constitution of the United States; that the Charter and ordinance were not complied with; and that the Charter itself was violated in the issuance of the bills. The answers put in issue all these grounds.

2. The case therefore involved three qustions: A claim that a state law is in violation of the United States Constitution; a claim that the Kansas City Charter was not complied with; and a claim that the Charter had been violated. The jurisdiction of the District Court was rested upon the first claim.

3. On July 7, 1921, the District Court entered a final decree in favor of the appellee, adjudging the tax bills to be null and void.

4. Within six months thereafter, and on January 4, 1922, appellants duly filed in the District Court their petition for appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, which said petition was duly allowed by the District Court and said appeal duly granted on January 4, 1922. Said appeal was thereafter duly filed and docketed in said Circuit Court of Appeals, and all necessary steps were taken for the due hearing of said appeal in said court.

5. Thereafter the appellee filed in said Circuit Court of Appeals his motion to dismiss said appeal upon the ground that said court had no jurisdiction to hear and determine the same, and on October 23, 1922, said Court, being of the opinion that it had no jurisdiction of said appeal, but that said appeal should have been taken direct to the Supreme Court of the United States, entered an order transferring the

appeal to the Supreme Court under the terms of the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto Section 238a.

6. In consideration of the fact that the jurisdiction of the United States Circuit Court of Appeals, under Sections 128 and 238 of the Judicial Code depends upon the nature of the questions involved in the suit and not upon the grounds of jurisdiction of the District Court, and by reason of the fact that there are in this case three questions involved, one coming within the jurisdiction of the Supreme Court under Section 238, and two coming within the jurisdiction of the Circuit Court of Appeals under Section 128, appellants allege that the Circuit Court of Appeals for the Eighth Circuit had jurisdiction of said appeal; that said appeal was properly taken and allowed to said court, and that said court should have overruled the motion to dismiss and proceeded to hear and determine said appeal in due course.

Wherefore, appellants pray that this cause be remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instructions to hear and determine the appeal herein, or that this Court in its discretion under the terms of Sections 239 240 and 262 of the Judicial Code, proceed to hear and determine the same as upon certificate from said Circuit Court of Appeals.

JUSTIN D. BOWERSOCK,
ARTHUR MILLER,
SAM'L J. MCCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
*Attorneys for Appellants.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

*Appellants,*

v. No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

---

## MEMORANDUM FOR APPELLANTS ON MOTION TO REMAND.

The order of the Circuit Court of Appeals for the Eighth Circuit, transferring the case to this Court, was based upon the Act of Congress, approved September 14, 1922, providing in effect that when an appeal has been taken to the wrong appellate court, it shall not be dismissed but shall be transferred to the right appellate court. The Court of Appeals held that the appeal in this case should have been taken to the Supreme Court, that the Court of Appeals was the wrong appellate court and that the case was one coming within the

terms of the act. We contend that the appeal was properly taken to the Court of Appeals.

The position of the appellee in the Circuit Court of Appeals and the holding of that court in transferring the case to the Supreme Court was that, since the jurisdiction of the District Court rested solely on the claim that a law of the state of Missouri is in controvention of the Federal Constitution, the Circuit Court of Appeals was wthout jurisdiction of the appeal.

In answer to this contention, appellants urge that under the Federal statutes and decisions, the grounds of jurisdiction of the District Court are not the criterion of appellate jurisdiction but that the latter depends upon the nature of the questions involved in the case.

It will be seen that appellants were confronted with the dilemma and are possibly caught in the "trap" referred to by Chief Justice Taft in an address to the American Bar Association at San Francisco, reported in the Journal of American Bar Association for October, 1922, at page 603, a trap created by the attempt of the statute to define the appellate jurisdiction of each court and by the language of the Supreme Court in certain cases hereinafter cited, interpreting that statute. We most earnestly urge that a fair consideration of the actual points decided by the Supreme Court and a slight modification of its language in a few cases, will do away with the trap so far as affects this appeal and assure appellants a hearing upon the merits, either in the Circuit Court of Appeals or in this Court.

We contend first that the appeal was properly taken; and second that, if it was not, it was properly certified here under the act of September 14, 1922.

## I.

Section 238 of the Judicial Code provides that direct appeals may be taken from the District Court to the Supreme Court (1) in any case in which the jurisdiction of the District Court is in issue, the question of jurisdiction alone being certified to the Supreme Court; (2) from the final sentences and decrees in prize causes; and (3) in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States. For present purposes at least, this section constitutes the entire authority of the Supreme Court to entertain appellate jurisdiction.

This section contains no word referring even remotely to the grounds of jurisdiction of the District Court. The right of appeal to the Supreme Court is based wholly on the character of the case or of the questions raised therein. Cases where the jurisdiction of the District Court *is in issue;* prize causes, cases that *involve* the Constitution, or in which constitutionality is *drawn in question,* or in which a law is *claimed* to be unconstitutional— these are the requirements laid down by the statute for a direct appeal. If construction is necessary to sustain this reading, the Supreme Court has several times so construed the section.

*Holder* v. *Aultman,* 169 U. S., 81, 18 S. Ct., 269;
*Loeb* v *Columbia Township Trustees,* 179 U. S., 472 21 S. Ct., 174;
*Boise Water Co.* v. *Boise City,* 230 U. S., 84, 33 S. Ct., 997.

Other cases to the same effect, but touching more exactly the main question under the motion, will be referred to hereafter.

It may, then, be laid down as an established principle that the jurisdiction of the Supreme Court to entertain and determine direct appeals from the District Courts is not affected in any way whatsoever by the grounds of jurisdiction of the District Courts. There is no case to the contrary.

## II.

Section 128 of the Judicial Code provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred thirty-eight." This would seem, at first blush, to be equally clear with Section 238. There is no reference whatsoever to grounds of jurisdiction of the District Courts. There is the simple provision that appeal lies to the Circuit Courts of Appeals in all cases in which it does not lie to the Supreme Court, the question being dependent entirely upon the character of the case or of the questions raised therein.

## III.

It was undoubtedly the "intention of the act in general that appellate jurisdiction should be distributed." *American Sugar Refining Co.* v *New Orleans*, 181 U. S. 277, 21 S. C.,

646. It may have been the intention to make the two sections mutually exclusive. But the Supreme Court has determined otherwise, and it may now be considered as established by the decisions of this Court:

(a) That where the *only question involved is* one covered by Section 238, the Supreme Court has exclusive jurisdiction of an appeal from the District Court.

*Union & Planters Bank* v *Memphis*, 189 U. S. 71, 23 S. Ct., 604;
*Vicksburg* v *Water Works Co.*, 202 U. S., 453, 26 S. Ct., 660;
*Carolina Glass Co.* v *South Carolina*, 240 U. S., 305, 36 S. Ct., 293;
*Raton Water Works Co.* v. *Raton*, 249 U. S. 552, 39 S. Ct., 384.

(b) That where the *only question involved* is one not covered by Section 238, the proper Circuit Court of Appeals has exclusive jurisdiction of an appeal from the District Court.

*Sugarman* v *United States*, 249 U. S., 182, 39, S. Ct., 191.

(c) That where two or more *questions are involved*, one of which is covered by Section 238, and one of which is not, then an appeal will lie to either court, neither being ousted of its jurisdiction because of the presence of questions which would give the other jurisdiction. To this extent, the appellate jurisdiction of the two courts is concurrent.

*Robinson* v *Caldwell*, 165 U. S., 359, 17 S. Ct., 343;

*Carter* v *Roberts*, 177 U. S., 496, 20 S. Ct., 713;
*Loeb* v *Columbia Township Trusees*, 179 U. S., 472, 21 S. Ct., 174;
*Spreckles Sugar Refining Co.* v *McClain*, 192 U. S., 397, 24 S. Ct., 376;
*Macfadden* v *United States*, 213 U. S., 288, 29 S. Ct., 490;
*Pomona* v *Sunset Tel. Co.*, 224 U. S. 330, 32 S. Ct., 477;
*Lemke* v *Farmers' Grain Co.*, 42 S. Ct., 244.

In *Robinson* v *Caldwell*, 165 U. S., 359, 17 S. Ct., 343 the defendant appealed direct from the Circuit Court to both the Circuit Court of Appeals and to the Supreme Court. The former heard and determined the appeal before it. The Supreme Court thereupon dismissed the appeal pending before it, in spite of the presence in the record of questions authorizing a direct appeal to it, namely, the construction of a treaty and the constitutionality of a Federal statute.

*Carter* v. *Roberts*, 177 U. S., 496, 20 S. Ct., 713, involved two questions: The construction of a Federal statute and its constitutionality. The defendant appealed to both courts. The Circuit Court of Appeals heard and determined the cause. The Supreme Court declined to take jurisdiction under the direct appeal, holding that under the circumstances it had jurisdiction only on certiorari or appeal from the Circuit Court of Appeals. The court says, (p. 500):

> "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where

> **such construction or application is involved with other questions,** may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance."

In *Loeb* v *Columbia Township Trustees,* 179 U. S., 472, 21 S. Ct., 174, the bill presented only a case of diversity of citizenship. The defendant by demurrer raised the question of constitutionality. The Supreme Court upholds its jurisdiction of a direct appeal, though stating that plaintiff might have appealed to the Circuit Court of Appeals.

The bill in *Spreckles Sugar Refining Co.* v *McClain,* 192 U. S., 397, 24 S. Ct., 376, alleged both the unconstitutionality of a Federal revenue act and also its misconstruction by the enforcing officers. In sustaining a writ of error to the Circuit Court of Appeals and a writ of error from that court to the Supreme Court, the latter holds that an appeal might go direct to either court.

In *Macfadden* v *U. S.,* 213 U. S., 288, 29 S. Ct., 490, on writ of error to the Circuit Court of Appeals from the Supreme Court, it is again laid down that if there is a *question involved* giving the former jurisdiction on appeal, that jurisdiction is not ousted because of a question warranting direct appeal to the Supreme Court. The Court reiterates that in such cases, appeals might be taken to either court.

To the same effect is *Pomona* v *Sunset Tel. Co.,* 224 U. S., 330, 32 S. Ct., 477.

And in *Lemke* v *Farmers Grain Co.,* 42 S. Ct., 244 a case relied on by appellee, and to which we shall refer later the *holding* of the Supreme Court is that where there is a **question involved** giving the Circuit Court of Appeals jurisdiction

and also one giving the Supreme Court jurisdiction, an appeal may go to either.

## IV.

The case at bar is one coming within the rule discussed in paragraph (c) of Point III above. It involves (subject to the contention made herein under Point VI) a claim that the law of a state is in contravention of the Constitution of the United States, under Section 238; and it unquestionably involves two entirely independent claims: one that the provisions of the Charter of Kansas City have been violated; and the other that the charter and ordinances of the city have not been complied with. These issues are all tendered by the bill itself and are met by the answers.

The bill is one to have certain tax bills issued by Kansas City declared null and void and to have them removed as a cloud on plaintiff's title. The bill alleges that the tax bills are void for three distinct reasons; first, that the charter of Kansas City and the ordinance under which the tax bills purport to have been issued, are in violation of the Constitution of the United States (Paragraphs 13 and 19); second, that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Paragraphs 6, 8 and 13); third, that Section 28 of Article VIII of the charter was violated in the issuance of the billls (Paragraph 17).

These were the issues upon which the case was tried, evidence was heard upon them all, the trial court considered them all and held the tax bills void. The decree does not specify the grounds upon which the court acted. The opinion of the court shows that the charter and ordinance were not held unconstitutional, but that the tax bills were deemed to be

confiscatory because of the method of carrying the charter provisions into effect. However, the grounds of action of the trial court could not in any way affect the question of appellate jurisdiction.

It is evident, therefore, that the case is one which under the authorities might be appealed to either this Court or the Circuit Court of Appeals (subject to the contention herein made under Point VI). Granting for the moment that the claim that the charter and ordinance were in contravention of the United States Constitution is *bona fide* and substantial, an appeal would lie to the Supreme Court under Section 238. There being also two questions not covered by Section 238, namely, the issue as to compliance with the charter and ordinance in the matter of the suit to be filed, and the issue as to the violation of Section 28 of Article VIII of the charter, an appeal would lie to the Circuit Court of Appeals under Section 128.

These several questions are not interdependent; none of them arise incidentally; the solution of one does not in any way affect or depend upon the others. They bring the case clearly within the language and ruling of the authorities cited in paragraph (c) of point III above. It follows that the appeal was properly taken to the Court of Appeals in spite of the claim that appellants might have taken it direct to the Supreme Court.

## V.

To combat this conclusion, appellee relies upon the language of five opinions in the Supreme Court in cases passing upon this question of appellate jurisdiction. These cases are:

*American Sugar Refining Co.* v *New Orleans,* 181 U. S., 277, 21 S. Ct., 646;
*Union & Planters' Bank* v *Memphis,* 189 U. S., 71 23 S. Ct., 604;
*Carolina Glass Co.* v *South Carolina,* 240 U. S., 305, 36 S. Ct., 293;
*Raton Water Works Co.* v *Raton,* 249 U. S., 552, 39 S. Ct., 384;
*Lemke* v *Farmers' Grain Co.,* 42 S. Ct., 244.

We may submit that there is language in all these opinions seeming to lend weight to appellee's contention—a contention that appellate jurisdiction direct from the District Courts depends, not upon the questions involved but upon the grounds of jurisdiction in the District Court. The contention, unless established by the language referred to, is utterly without any basis whatsoever in the statutes or in the authorities.

As said by the Supreme Court in *Macfadden* v *U. S.* 213 U. S., 288, 29 S. Ct.,, 490, "the language of the opinion should be interpreted in the light of the facts of the case." With this caution in mind, we ask a consideration of the five decisions relied upon by appellees.

1. In *American Sugar Refining Co.* v *New Orleans,* 181 U. S., 277, 21 S. Ct., 646, the suit was originally filed in the state court and was removed to the United States Court solely because of diversity of citizenship. A constitutional question was raised in defense. The case was taken to the Circuit Court of Appeals on writ of error, which was dismissed by that court because a constitutional question was involved. On certiorari to the Supreme Court, the question was whether the

Court of Appeals had jurisdiction to dispose of the writ of error. The Supreme Court held that it had.

The decision is clearly right, and in line with the principles stated in Point III above. The constitution being involved, an appeal would have been proper to the Supreme Court. Diversity of citizenship being involved, an appeal was proper to the Circuit Court of Appeals. The Supreme Court does say that there is a right to appeal to either court in cases where *jurisdiction* below is rested both on citizenship and on a constitutional question. But if we interpret that language in the light of the fact that diversity of citizenship and constitutionality were the issues involved in the case, we have no right to draw the inference that those constitute the *only* basis for appeal to either court.

2. *Union & Planters' Bank* v *Memphis*, 189 U. S., 71, 23 S. Ct., 604, is a case in which appeals were taken from the Circuit Court both to the Circuit Court of Appeals and to the Supreme Court. The Court of Appeals heard the case and entered a judgment from which, also, an appeal was prosecuted to the Supreme Court. The latter considered together the direct appeal from the Circuit Court and the appeal from the Court of Appeals. The Supreme Court decided the case upon the direct appeal, reversing the judgment of the Circuit Court of Appeals, not upon the merits, but because the appeal was not within the jurisdiction of the latter court.

The decision is clearly right. The only question involved in the case is that a state law is in contravention of the United States Constitution. That question gave the Supreme Court jurisdiction under Section 238, and there was no diversity of citizenship *or other question* bringing the appeal under the terms of Section 128. The jurisdiction of the Supreme Court was therefore exclusive.

There is language in the opinion discussing the grounds of jurisdiction alleged in the bill. But the court's attention was not challenged to the matter. The language is appropriate to the exact question presented by the record and it should be so interpreted. Under the facts of that case, the *questions involved* and the *grounds of jurisdiction* of the Circuit Court were identical. The sole question involved was the claim of unconstitutionality; the sole ground of jurisdiction of the Circuit Court was the claim of unconstitutionality. The decision is that the single claim of unconstitutionality gave the Supreme Court exclusive jurisdiction on appeal. The language should not be given wider significance.

3. Again in *Carolina Glass Co.* v *South Carolina*, 240 U. S., 305, 36 S. Ct., 293, a case very similar so far as procedure is concerned to *Union & Planters' Bank* v *Memphis, the sole* question involved was the constitutional question, which was as well the sole question on which jurisdiction was alleged. The decision is unquestionably right. The Supreme Court had exclusive jurisdiction under Section 238 and the Circuit Court of Appeals therefore had none under Section 128. The language of the opinion should be interpreted in the light of the facts of the case.

4. *Raton Water Works Co.* v *Raton*, 249, U. S., 552, 39 S. Ct.,384, is a similar case. The jurisdiction of the District Court was based entirely on a claim that a law of a state was unconstitutional. This was also the only question involved. Upon appeal to the Circuit Court of Appeals for this Circuit, the question of appellate jurisdiction was certified to the Supreme Court. The latter court properly held that the Circuit Court of Appeals had no jurisdiction of the appeal. The lan-

guage of the opinion refers to the basis of jurisdiction of the District Court, because that was the exact situation presented by the facts. The sole basis of jurisdiction, however, and the sole question involved were in that case identical and the language should not be applied to a different case.

5. *Lemke* v *Farmers Grain Co.*, 42 S. Ct., 244, is, we believe, the last case on the subject. In that case, the bill alleged the unconstitutionality of a state law and also its repugnancy to a federal statute. Here, therefore, were two questions involved; first, was the state law constitutional; second, was it repugnant to the federal statute. The same two questions went to the jurisdiction of the District Court in the first instance—the jurisdiction of the District Court might rest on either. The Supreme Court holds that an appeal would lie to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court under Section 128. This is clearly in line with the established doctrine.

Again, however, language is used capable of too broad application. The case did present two questions raised on the bill,—constitutionality and repugnancy to a federal statute, each of which constituted a basis for jurisdiction in the District ourt. The Supreme Court says that where jurisdiction is invoked solely upon constitutional grounds the appeal must go to the Supreme Court, but that where jurisdiction is invoked also upon other federal grounds it may go to the Court of Appeals.

If this language is interpreted in the light of the facts, it is defensible and correctly states the law. If on the other hand, it is interpreted to mean that in every case appellate jurisdiction is dependent upon the grounds invoked by the bill, it is contrary to the terms of the statutes themselves and of

a line of Supreme Court decisions construing those statutes. As to the jurisdiction of the Supreme Court, it has been directly and conclusively decided by the authorities cited herein under Point I and many others, that the grounds alleged in the bill are utterly immaterial. So far, at least, under all the cases, the language of *Lemke* v. *Farmers Grain Co.*, is wrong, if interpreted as placing the question upon the grounds of jurisdiction of the District Court.

6. As to the jurisdiction of the Circuit Court of Appeals, the very cases cited in *Lemke* v. *Farmers Grain Co.*, indicate conclusively that the language must not be so broadly interpreted; and there are other decisions to the same effect.

The case of *Loeb* v *Columbia Township Trustees*, 179 U. S., 472, 21 S. Ct., 174, is the earliest authority we have found directly considering this matter. In that case, jurisdiction of the Circuit Court was rested on diversity of citizenship alone. A constitutional question arose on demurrer, and a writ of error was taken direct from the Supreme Court. That court holds that its jurisdiction under the statute depends not at all on the grounds alleged in the petition as giving the trial court jurisdiction, but wholly on the fact that a constitutional question is involved. The Court expressly points out a distinction between the provisions of the statute covering direct appeals to the Supreme Court and to the Courts of Appeals, and the provisons of the statute relative to appeals from the Courts of Appeals themselves to the Supreme Court. In the latter case *only* are the grounds of jurisdiction of the trial court mentioned or referred to in the statute. The questions are disposed of in the following manner:

> "The petition shows that the parties are citizens of different states. It states no other ground of Federal

jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court." (Page 477).

"It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the 5th section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant." (Page 477).

"It is true that the plaintiff might have carried this case to the circuit court of appeals, and, a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court." (Page 478).

**"When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground;** because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. **But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the 5th section.** Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was

claimed that a state law was repugnant to the Constitution of the United States." (Page 479).

Following the Loeb case and directly in line with it, is *Spreckles Sugar Refining Co.* v *McClain*, 192 U. S., 397, 24 S. Ct., 376. The bill in that case was not based on diversity of citizenship either in whole or in part. It alleged the unconstitutionality of a federal revenue act and also a misconstruction thereof. On error to the Circuit Court of Appeals, it is held that the appeal might have gone to either court. In a very clear and logical presentation of the principles governing its action, the Supreme Court says, (Page 407):

"Was the judgment of the circuit court subject to review only by this court, or was it permissible for the plaintiff to take it to the circuit court of appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the circuit court. *Huguley Mfg. Co.* v *Galeton Cotton Mills*, 184 U. S. 291, 295, 46 L. Ed. 546, 549, 22 Sup. Ct. Rep., 452. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the circuit court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the 5th section of the act of 1891, and, consequently, could not have come here directly from the circuit court. **As, then, the case made by the plaintiff involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the circuit court of appeals had jurisdiction to review the judgment of the circuit court,** although, if the

plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the circuit court, or, at its election, to go to the circuit court of appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the circuit court of appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to this court. *Robinson* v *Caldwell*, 165 U. S., 359, 41 L. Ed. 745, 17 Sup. Ct. Rep., 343; *Loeb* v *Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174; *Ayers* v. *Polsdorfer*, 187 U. S., 585, 47 L. Ed., 314, 23 Sup. Ct. Rep., 196."

The Court then proceeds to discuss the provisions of Section 128, relative to appeals from the Circuit Court of Appeals to the Supreme Court, as to which the grounds of jurisdiction of the trial court are expressly made material by the statute. The entire opinion of the court on the question of appellate jurisdiction (pp. 405-410) is in accord with our position in this memorandum.

These two cases were confirmed by *Macfadden* v. *U. S.*, 213 U. S., 288, 29 S. Ct., 490. That was on indictment under a federal statute. A constitutional question became involved later. On error to the Circuit Court of Appeals, the Supreme Court holds that either court had jurisdiction on appeal. The basis of appellate jurisdiction is again pointed out by the court and it is again denied that the grounds of jurisdiction alleged in the bill have any bearing on the question. The Court says, (Page 293):

"Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a

writ of error might have been sued out originally directly from this court under clause 5. *Loeb* v. *Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174. But this was not done, and by the appeal to the circuit court of appeals, the right of direct appeal here was lost. *Robinson* v. *Caldwell*, 165 U. S., 359, 41 L. Ed., 745, 17 Sup. Ct. Rep., 343.

Section 6 of the act provides that the circuit courts of appeal shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act:' and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the circuit court of appeals of its jurisdiction. *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S., 277, 45 L. Ed., 859, 21 Sup. Ct. Rep., 646. In the case at bar the circuit court of appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the circuit court of appeals was final. The act contemplated that certain judgments of the circuit court of appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in §6 of the act. **It is to be observed that the line of division between cases appealable to this court and those appealable to the circuit court of appeals, made by § 5 of the act, is based upon the nature of the case or of the questions of law raised.** But the line of division between cases appealable from the circuit court of appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the question of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court,—whether the jurisdiction rests upon the character of the parties or the nature of the case. *Hanley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. Ed., 546, 22 Sup. Ct. Rep., 452, where it was said by the chief justice,

citing cases, 'the jurisdiction referred to is the jurisdiction of the circuit court as originally invoked.' **The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the circuit court of appeals to this court, is important, and a neglect to observe it leads to confusion."**

The case of *Pomona* v *Sunset Tel. Co.*, 224 U. S., 330 32 S. Ct., 477, is directly in line with these authorities. The Court says, at page 342 of the opinion:

"This is a bill brought by the appellee, a California corporation, to restrain the city of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellees placing further poles and wires in the streets. The circuit court dismissed the bill (164 Fed., 561), but the decree was reversed and an injunction granted by the circuit court of appeals (97 C. C. A., 251, 172 Fed., 829). Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, Chap. 230, 14 Stat. at L. 221 (Rev. Stat. § 5263 *et seq.* U. S. Comp. Stat. 1901, p. 3579), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the circuit court of appeals. *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S., 397, 407, 48 L. Ed. 496, 499, 24 Sup. Ct Rep., 376. The remaining ground is that the Constitution of California, as amended in 1911, or the statutes of the state, contained a grant with which the Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources, it has no right to occupy the streets."

Not one of these cases has ever been questioned or its holding modified in anyway and two of them, *Spreckels Sugar Refining Co.* v. *McClain* and *Pomona* v *Sunset Tel. Co.*, are cited as authorities in *Lemke* v. *Farmers' Co.*, 42 S. Ct., 244, relied on by appellee.

In view of the plain terms of the statute and of the unquestioned soundness of these authorities, we submit that the language of the Supreme Court in the cases apparently adverse must be read as that court itself demands in the light of the issues presented in those cases. To read the language otherwise, throws the decisions upon an important matter of appellate jurisdiction into conflict and confusion; to read it so, harmonizes the authorities and makes the provisions of the statute clear and comprehensive.

A very strong presentation of the question will be found in an article by Charles W. Bunn, Esq., of St. Paul, Minn., in 35 Harvard Law Review 902.

## VI.

**It is by no means clear that there is a constitutional question involved in this appeal sufficient to bring the case to the Supreme Court direct from the District Court. It is quite possible that appellant would have found himself in as great difficulty if he had taken the other horn of the delimma by appealing to this Court,**

The 14th Amendment protects against *state* action only. Admittedly, the act of a city is, in the proper case, an act of the state within the meaning of the Amendment. However,

the action of the city can be imputed to the state only when the municipality is acting within the scope of its delegated powers. A bill which alleges that the acts in question were outside the scope of the city's authority, does not invoke the 14th Amendment.

*Barney* v. *New York*, 193 U. S., 430, 24 S. Ct. 502.

Paragraph 6 of the bill very definitely avers that by reason of the failure of the city to comply with Section 24 of Article VIII of the charter, with respect to the suit in the circuit court required by that section,

> "the Board of Park Commissioners was without right or authority to let a contract for said work, and the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in said benefit district, or to issue tax bills for such work against said lands."

Again in paragraph 17 of the bill appears the following:

> "Complainant states that the taxing of his lands, which are far removed from and have no access to or use of said boulevard, at the same rate as the lands immediately fronting on and particularly benefited by said boulevard, was in violation of said Section 28 of Article VIII of the Kansas City Charter, which requires that the tax for such grading costs shall be laid 'in proportion to the benefits accruing to the several parcels of land' in the benefit district, and was palpably discriminatory, inequitable and unjust."

Such allegations do not invoke the 14th Amendment, but, on the contrary, prevent its application.

*Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S., 258, 13 S. Ct., 95;

*Barney* v. *New York*, 193 U. S., 430, 24 S. Ct., 502;
*Siler* v *Louisville & N. Ry. Co.*, 213 U. S., 175, 29 S. Ct., 451;
*Memphis* v. *Cumberland Tel. & Teleg. Co.*, 218 U. S., 624, 31 S. Ct., 115.

The allegations in the bill with regard to the lack of proper service of process on the appellee in the Circuit Court suit brought by the city in purported compliance with the charter, raise no constitutional question. An allegation that the judgment of a state court is violative of due process because the court was without jurisdiction to render the judgment, does not invoke the 14th Amendment.

*Carey* v. *Houston & Texas Ry. Co.*, 150 U. S., 170 14 S. Ct., 63;
*Cornell* v. *Green*, 163 U. S., 75, 16 S. Ct., 969;
*Cosmopolitan Mining Co.* v. *Wash.*, 193 U. S., 460, 24 S. Ct., 489;
*Burt* v. *Smith*, 203 U. S., 129, 27 S. Ct., 37;
*Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S., 225, 27 S. Ct., 476;
*Childers* v. *McClaughry*, 216 U. S., 139, 30 S. Ct., 370.

The bill also contains allegations to the effect that complainant's constitutional rights were violated because under the charter and ordinance no opportunity was afforded complainant for a hearing upon the amount and apportionment of the benefits accruing from the improvement, and upon the valuation fixed by the city assessor upon complainant's

property. That these features of the assessment proceeding do not involve a violation of due process of law has been repeatedly held by the United States Supreme Court and the Supreme Court of Missouri; and under such circumstances such allegations do not raise a federal question.

The construction or application of the federal constitution must be *substantially* involved. It must *clearly* and *necessarily* be drawn in question.

> *Goodrich* v *Ferris*, 214 U. S., 71, 29 S. Ct., 580;
> *O'Callaghan* v *O'Brien*, 199 U. S., 89, 25 S. Ct., 727;
> *Empire State-Idaho Mining Co.* v *Hanley*, 205 U. S., 225, 27 S. Ct., 476.

And if the point raised has already been definitely passed upon by the courts, and the constitutionality sustained, the averments with reference to a violation of due process of law will not invoke the jurisdiction of the court.

> *Brolan* v. *U. S.*, 236 U. S., 216, 35 S. Ct., 285;
> *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S., 123, 34 S. Ct., 874;
> *Knop* v. *Monogahela etc. Co.*, 211 U. S., 485, 29 S. Ct., 188.

There are also allegations that the tax bills in question are confiscatory. But the averments as to this point are not sufficient to raise a question under the 14th Amendment. In *American Sugar Refining Co.* v. *U. S.*, 211 U. S., 155, 29 S. Ct., 89, the court says:

> "We concur with counsel for the government that, if the construction or application of the Constitution of

the United States, within the meaning of § 5, Act of 1891, is involved in every case where one claims that, according to his interpretation of a statute, excessive duty or tax has been demanded by executive officers, * * * this court must entertain direct appeals from the circuit court in most tariff and tax controversies; which we regard as out of the question."

It would appear from these authorities that while the jurisdiction of the District Court may have been based by the bill solely upon the alleged constitutional question, no such question was actually involved so as to justify an appeal direct to this Court.

## VII.

Appellee has filed a motion to dismiss this appeal upon the ground that the Circuit Court of Appeals had no jurisdiction of it and that appellants are not entitled to the benefit of the Act of September 14, 1922. We submit that the Court of Appeals did have jurisdiction; that if so, the Act of September 14, 1922, does not apply; and that the case should therefore, be remanded to that court or retained here for determination as upon certificate from said Court of Appeals under Sections 239, 240 and 262 of the Judicial Code.

If, however, this Court shall be of opinion that the Appeal was taken to the wrong court, then we contend that the terms of the Act of September 14, 1922, do apply, that they are valid and that under them this court should proceed to hear and determine the merits. Our contentions and au-

thorities on this point are contained in our memorandum filed in opposition to the motion to dsmiss therein.

Respectfully submitted,

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CITATIONS: